TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 265.

THE WASHINGTON, ALEXANDRIA AND GEORGETOWN STEAM-PACKET COMPANY, PLAINTIFF IN ERROR,

vs.

FREDERICK E. SICKLES AND TRUMAN COOK, USE OF GEO. MATTINGLY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 26, 1872.

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5 The answer of the chief justice and justices of the supreme court of the District of Columbia, within named.

The record and proceedings whereof mention is within made follow in these words, to wit:

Writ.

FREDERICK E. SICKLES AND TRUMAN COOK
vs.
THE WASHINGTON, ALEXANDRIA AND GEORGETOWN STEAM-PACKET COMPANY.

The United States of America to the marshal of the District of Columbia, greeting:

We command you, that you summons the Washington, Alexandria and Georgetown Steam-Packet Company, before the circuit court of the District of Columbia, to be held for the county aforesaid, at the city of Washington, on the fourth Monday of March next, to answer unto Frederick E. Sickles and Truman Cook, in a plea of trespass
6 on the case, &c. Hereof fail not at your peril; and have you then and there this writ.

Witness James Dunlop, esquire, chief judge of our said court, at the city of Washington, the 14th day of December, anno Domini one thousand eight hundred and fifty-five.

Issued the 26th day of December, 1855.

[SEAL OF COURT.] JOHN A. SMITH, *Clerk.*

Marshal's return.

Summoned James Adams, president.

J. D. HOOVER, *Marshal D. C.*

Declaration.—Filed June 13, 1856.

FREDERICK E. SICKLES AND TRUMAN COOK
vs.
THE WASHINGTON, ALEXANDRIA AND GEORGETOWN STEAM-PACKET COMPANY.

7 The Washington, Alexandria and Georgetown Steam-Packet Company was summoned to answer Frederick E. Sickles and Truman Cook, of a plea of trespass on the case upon promises; and, thereupon, said plaintiffs, by Joseph H. Bradley, their attorney, complain: For that, whereas, heretofore, to wit, on the eighteenth day of June, in the year eighteen hundred and forty-four, at the county aforesaid, the said plaintiffs being the owners of the patent-right for a certain machine, called Sickles' cut-off, designed to effect a saving in the consumption of fuel by steam-engines; and the said defendants being the owners of a steamboat called the "Columbia," running on the Potomac River and Chesapeake Bay, it was mutually agreed by and between said plaintiffs and said defendants, that said plaintiffs would cause one of said machines to be constructed, and attached to the engine of said steamboat of defendants, as soon as the same could conveniently be done, at a cost not to exceed two hundred and fifty dollars, the
8 cost and expense of attaching the same to be paid for out of the

first savings of fuel effected by its use; and that said cut-off should be constructed and applied to said engine by the firm of T. W. & R. C. Smith, of Alexandria, and if said cut-off, when applied to said engine, should fail to effect a saving of fuel, that it should be removed therefrom at the expense of said plaintiffs; and it was also agreed, in consideration thereof, that if said cut-off, when constructed and applied to said engine, should effect a saving in the consumption of fuel thereby, that said defendants would use the said cut-off on their engine on said steamboat Columbia, during the continuance of the patent-right of said plaintiffs, if said boat should last so long, and would apply the value of all the first savings of fuel on board said boat effected by the use of said cut-off, in the first place, to the payment of the cost and expense of constructing and attaching said cut-off to the engine of said boat, not exceeding two hundred and fifty dollars, until the same
9 was fully paid and satisfied. And thereafter, and after having paid said cost and expense, that said defendants would, during the continuance of said patent-right, if said steamboat should last so long, pay to said plaintiffs three-fourths of the value of the fuel saved by the use of said cut-off. And it was also agreed, there and then, by and between said plaintiffs and said defendants, that the saving of fuel caused by the use of said machine, called Sickles's cut-off, on said steamboat should be ascertained, at such time as said plaintiffs should desire it, in the following manner, to wit, by taking two piles of wood, each of equal quantity, and using the same, first one pile without, and then the other with, the use of said cut-off, and thus to show whether the said boat would run the longest, under the same circumstances, with or without the use of said cut-off. And that the said proportion of savings, as aforesaid ascertained, should be paid by said defendants
10 to said plaintiffs weekly or monthly, or whensoever said defendants should be requested to pay the same. And thereupon the said plaintiffs, relying upon said promises and undertakin's of said defendants, and at their request, at great cost, to wit, at the cost of two hundred and twenty-five dollars, did cause and procure the firm of T. W. & R. C. Smith, of Alexandria, to construct and apply to said engine of said steamer Columbia said machine, called Sickles's cut-off, which said machine ever since, to wit, from the ninth day of November, in the year eighteen hundred and forty-four, continually, to the bringing of this action, has been used by said defendants in and upon said boat, attached to the engine thereof. And the said plaintiffs aver and say, that, heretofore, to wit, on the nineteenth day of August, in the year eighteen hundred and forty-five, at the county aforesaid, they gave notice to said defendants that, on the next day, that is to say, on the twentieth day of August, in the year eighteen hundred and forty-
11 five, they desired to make the experiment, in said agreement mentioned, to ascertain the amount of fuel saved by the use of said Sickles's cut-off, and for that purpose, that one of said plaintiffs would go from the city of Washington, in the District of Columbia, to the city of Baltimore, in the State of Maryland, in the said steamboat, on the said day, to wit, the twentieth day of August, before-mentioned, for the purpose of making said experiment. And the said defendants, then and there, by their president, did assent thereto, and did direct the officers of said boat, or some of them, to aid in conducting said experiment. And said plaintiffs further say, that one of said plaintiffs, to wit, the said Truman Cook, did, on said 20th of August, A. D. 1845, proceed in said boat from said city of Washington to said city of Baltimore, and on the said voyage, with the assistance of the officers of said

boat, make the said experiment, by taking two piles of wood of equal dimensions, and, under like circumstances, using one pile of wood
12 without, and the other pile of wood with, the said cut-off in operation. The pile of wood used without the said cut-off being in operation was burned in two hours and seven minutes; and the pile used with the Sickles cut-off in operation lasted three hours and fifteen minutes, the engine making the same number of revolutions, to wit, twenty-one per minute, showing a saving in favor of said cut-off of thirty-four and one hundred and seventy-five one-hundred-and-ninetieth per cent.; of all of which the said defendant, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice. And said plaintiffs aver that a great quantity of fuel has been saved to said defendants by the use of Sickles's cut-off on the engine of said steamboat Columbia, from the thirteenth day of October, A. D. 1846, up to the time of bringing this action, viz., the twenty-sixth day of December, A. D. 1855, viz., the amount of six thousand cords of wood, of great value, to wit, of the value of $15,000; and said plaintiffs say that
13 they are entitled to have and recover of said defendants, as a part of said savings, a large sum of money, to wit, the sum of $10,000, the value of three-fourths of the fuel saved to said defendants, by the use of said cut-off on the engine of said steamboat of defendants during the period of time last aforesaid.

Yet the said defendants have not paid the said several sums of money before mentioned, or any part thereof, although often requested so to do, to wit, on the day and year last aforesaid, at the county aforesaid, and often afterwards; but the same to pay, or any part thereof, have hitherto wholly refused, to the damage of said plaintiffs in the sum of $20,000; and, therefore, they sue, &c.

W. J. STONE, J'R,
Of Counsel for Plaintiff.

Plea.—Filed October term, 1856.

The defendant says it did not assume and promise in manner and form as the plaintiffs have above against it declared.

Joinder in issue. October term, 1856.

14 *Extract from minutes of the supreme court of the District of Columbia.*

TUESDAY, *Nov.* 12, 1867.

SICKLES AND COOK, USE OF GEORGE MATTINGLY, PL'FFS, *v.* STEAM-PACKET COMPANY, DEF'T. } No. 70. T. January, 1863. 22 cal.

On motion of Mr. Bradley, j'r, leave is granted the plaintiff to amend his declaration.

Amended nar.—Filed by leave of court, March 4, 1868.

In the supreme court of the District of Columbia, 4 day of March, A. D. 1868.

SICKLES & COOK *v.* THE W. A. & G. STEAM P. Co. } At law. No. 174. T. January, 1863.

Plaintiffs' amended declaration, filed by leave of court.

The plaintiffs sue the defendant for money payable to the plaintiffs for the use of a certain apparatus patented by one Frederick E. Sickles on the 20th day of May, 1842, for lifting and tripping the valves of steam-engines, and also an improved water reservoir and plunger.

And the plaintiffs sue the defendant for money received by the defendant for the plaintiffs; and the plaintiff' claims $25,000.

BRADLEY & BRADLEY,
Pl'ffs' Att'ys.

Pleas.—Filed March 1, 1871.

FREDERICK E. SICKLES AND TRUMAN COOK
v.
THE WASHINGTON, ALEXANDRIA AND GEORGETOWN STEAM-PACKET COMPANY.
No. 164. Trials. January T., 1863.

1. The defendant, for plea, says it did not undertake or promise in manner and form as the plaintiffs have complained against it.

2. And, for a further plea, it says that the plaintiffs ought not to maintain this action, because it says that it did not, at any time within three years next before the commencement of this suit, undertake or promise in manner and form as the plaintiffs have complained against it, and this it is ready to verify; wherefore it prays judgment if the plaintiffs ought to maintain their action.

And, for a further plea, it says that the plaintiffs ought not to maintain this action, because it says that the said several supposed causes of action in the said declaration mentioned did not, nor did any or either of them, accrue to the said plaintiffs at any time within three years next before the commencement of this suit, in manner and form as the said plaintiffs have above thereof complained against the said defendant, and this it is ready to verify; wherefore it prays judgment if the plaintiffs ought to maintain their action.

W. D. DAVIDGE,
For Defendant.

Motion to strike out pleas.—Filed March 2, 1871.

In the supreme court of the District of Columbia.

FREDERICK E. SICKLES AND TRUMAN COOK
vs.
THE WASHINGTON, ALEXANDRIA AND GEORGETOWN STEAM-PACKET COMPANY.
No. 174. Trials January T., 1863.

The plaintiffs, by their attorney, Joseph H. Bradley, jr., in open court, and the defendant, by its attorney, Walter D. Davidge, being present, move the court, this second day of March, A. D. 1871, that the pleas filed by the defendant on the first day of March, A. D. 1871, be not received, because, they say—

1st. The said pleas were not filed in due time.

2d. They are pleas to an amended declaration filed by the plaintiffs on the fourth day of March, A. D. 1868, after leave of court first had and obtained, as appears of record, a copy of which was

served on the defendant's counsel at the time the same was filed, and to which the defendant did not plead until the first day of March, A. D. 1871, whereby the defendant stands in default.

3d. The defendant has, long prior to the present of court, had full notice that said amended declaration was filed, and the second and third of his aforesaid pleas are the statute of limitations, and cannot be filed as of right out of due time.

4th. The second and third pleas are not "necessary to determine in this suit the real questions in controversy" between the plaintiffs and the defendant; but, on the contrary, are designed to prevent such determination, and also to exclude all inquiry into the merits of this suit, if they prevail.

19 5th. When the defendant is in court after service of original process served, he is bound to take notice of all amendments in the pleadings filed by the plaintiff after leave of the court, and a copy served at the time of filing, without the special written notice to plead attached to the copy of the original declaration.

JOS. H. BRADLEY, JR.,
Attorney for Plaintiffs.

Proceedings before the supreme court of the District of Columbia, holding a special term, and circuit court for said district, commencing the third Monday, 23d day of January, A. D. 1871.

JANUARY 23, 1871.

By order of Chief Justice Cartter, presiding, the court is opened by proclamation of the marshal, pursuant to the rule of court.

TUESDAY, *March* 2, 1871.

20 Session resumed pursuant to adjournment, Chief Justice Cartter presiding.

SICKLES AND COOK, USE OF GEORGE MATTINGLY, pl'tiffs
vs.
THE WASHINGTON, ALEXANDRIA AND GEORGETOWN STEAM-PACKET COMPANY, defendant.
} At law No. 174. January T., 1863. Cal. 3.

And now come as well the plaintiffs, by their attorneys, Messrs. Bradley and Dickinson, as the defendant, by its attorneys, Messrs. Davidge and Brent; and thereupon the plaintiffs move the court, that the pleas filed by the defendant on the 1st day of March, 1871, be not received. And thereupon said motion coming on to be heard, and having been argued by counsel on both sides, and fully understood, it is considered that said motion be, and the same is hereby overruled, except as to the statute of limitations, and as to them said motion is
21 granted, and the pleas not received.

And thereupon comes a jury of good and lawful men of this District, to wit: John A. Waters, Richard Cruit, jr., Jonathan Buckman, Thomas H. Parsons, Christopher C. Dickson, William D. Wise, Alexander McKenzie, Leonard C. Cook, George W. Hatton, Richard Barry, William C. Harper, and John F. King, who, being sworn to try the issue above joined on the amended declaration, are respited until the meeting of the court to-morrow.

Defendants first exception.

SICKLES & COOK
v.
STEAM-PACKET COMPANY. } 174. Trials Jan. term, 1863.

At the hearing of the above motion, the leave of the court to amend as follows, "Sickles and Cook, use of George Mattingly, vs. Steam-Packet Company, defendant, No. 70, T. January, 1863, 22 cal," on motion of Mr. Bradley, jr., leave is granted the plaintiff to amend
22 his declaration, and the amendment in pursuance thereof, as follows:

The plaintiffs sue the defendant for money payable the plaintiffs for the use of a certain apparatus, patented by one Frederick E. Sickles, on the 20th day of May, 1842, for lifting and tripping the valves of steam-engines, and also an improved water-reservoir and plunger. And the plaintiffs sue the defendant for money received by the defendant for the use of the plantiffs, and the plaintiffs claim $25,000.

BRADLEY & BRADLEY,
Pl'ffs Att'ys.

And the following docket entries in the cause—
Trials to January term, 1863.

FREDERICK E. SICKLES AND TRUMAN COOK,
use of George Mattingly,
vs.
THE WASHINGTON, ALEXANDRIA & GEORGE-
town Steam-Packet Company.

Mandate.
1863, May. June 1, continued.
23 " June 23. Notice of trial by plaintiff.
" July 20. Continued.
" Nov. 8th Dec. Continued; carried to calender.
1871. March 1. Pleas non ass't and limitations.
" " 6. Deposition of Tho's Worthington were read, and it was shown to the court that a copy of the amended declaration was served on the attorney of the defendant, but without the notice to plead required by the rule of court No. 15,* and was as follows: "The plaintiffs sue the defendant for money payable to the plaintiffs for the use of a certain apparatus, patented by one Frederick E. Sickles, on the 20th day of May, 1842, for lifting and tripping the valves of steam-engines, and also an improved water reservoir and plunger. And the plaintiffs sue the defendant for money received by the defendant for the use of the plaintiffs, and the plaintiffs claim $25,000.

BRADLEY & BRADLEY,
Pl'ffs' Att'ys.

Nor was any rule to plead, laid in the cause after the amended
24 declaration. Therefore the court ordered that the second and

*RULE 15.—A notice to plead shall be subscribed to every declaration in the following form: "The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof: otherwise judgment, P. Q. attorney for plaintiff." Except this notice to plead, subscribed to the declaration, no rule to plead or demand of plea shall be necessary.

third pleas be stricken out; to which ruling the defendant excepts and prays the court to sign, seal, and cause to be enrolled this its first bill of exceptions; which is done accordingly, this 2d of March, 1871.

D. K. CARTTER, [SEAL.]
Chief Justice.

Defendant's second exception.

After the jury were sworn, the plaintiffs, to support the issue on their part, offered to read in evidence the record of a former recovery, had in a suit between these parties, brought on the 19th March, 1846, made a part hereof, and the defendants objected to the admissibility of the said records, but the court admitted the same in evidence, but excluded it as evidence to prove either the fact that a special contract was made between the parties in this case, or the terms thereof, or as conclusive of any other fact in this case, and thereupon the de-
25 fendants except; and this, their second bill of exceptions, is signed, sealed, and enrolled, this 3d March, 1871.

D. K. CARTTER, [SEAL.]
Chief Justice.

Record referred to in defendant's second bill of exceptions.

FREDERICK E. SICKLES AND TRUMAN COOK
vs.
THE WASHINGTON, ALEXANDRIA AND GEORGETOWN STEAM-PACKET COMPANY. } No.

Mandate from Supreme Court.
Nar., non-ass't, and issue.
22d November jury found verdict for plaintiffs. Damages, $1,695.79, with interest from 16th March, 1846. Verdict rendered 7th December. 14th December, judgment for plaintiffs on the first count in the declaration.
1855. December 14th. Appeal-bond, writ of error, citation, &c.
Mandate from Supreme Court U. S. certifying the docketing
26 and dismissing said writ of error, with costs, on 19th December, 1856.
Capias ad respondendum issued in the above case in the usual form.

Nar.

Nar. in the above case, in the words and of the tenor following, to wit:

FREDERICK E. SICKLES AND TRUMAN COOK
vs.
THE WASHINGTON, ALEXANDRIA AND GEORGETOWN STEAM-PACKET CO.

The Washington, Alexandria and Georgetown Steam-Packet Company was summoned to answer unto Frederick E. Sickles and Truman Cook in a plea of trespass on the case upon promises; and, thereupon, the said plaintiffs, by Joseph H. Bradley, their attorney, complain:
For that, whereas, heretofore, to wit, on the eighteenth day of June,

in the year eighteen hundred and forty-four, at the county aforesaid, the said plaintiffs being the owners of the patent-right for a cer-
27 tain machine called "Sickles' cut-off," designed to effect a saving in the consumption of fuel by steam-engines, and the said defendants being the owners of a certain steamboat called the Columbia, running on the Potomac River and Chesapeake Bay, it was mutually agreed, by and between said plaintiffs and said defendants, that said plaintiffs would cause one of said machines to be constructed and attached to the engine of said steamboat of defendants so soon as the same could conveniently be done, at a cost not to exceed two hundred and fifty dollars, the cost and expense of attaching the same to be paid for out of the first saving of fuel effected by its use; and the said "cut-off" should be constructed and applied to said engine by the firm of T. W. & R. C. Smith, of Alexandria; and if said "cut-off," when applied to said engine, should fail to effect a saving of fuel, then it should be removed therefrom at the expense of said plaintiffs. And it was also agreed, in consideration thereof, that if said "cut-off," when con-
28 structed and applied to said engine, should effect a saving in the consumption of fuel thereby, that said defendants would use said "cut-off" on their said engine in said steamboat Columbia during the continuance of the patent-right of said plaintiffs, if said boat should last so long, and would apply the value of all the first savings of fuel on board said boat, effected by the use of said "cut-off," in the first place, to the payment of the cost and expense of constructing and attaching said cut-off to the engine of said boat, not exceeding two hundred and fifty dollars, until the same was fully paid and satisfied; and thereafter, and after having paid said cost and expense, that said defendants would, during the continuance of said patent-right, if said steamboat should last so long, pay to said plaintiffs three-fourths of the value of the fuel saved by the use of said cut-off. And it was also agreed, then and there, by and between said plaintiffs and said defendants, that the saving of the fuel caused by the use of the said
29 machine called "Sickles's cut-off" on said steamboat should be ascertained at such time as said plaintiffs should desire it, in the following manner, to wit, by taking two piles of wood, each of equal quantity, and using the same, first, one pile without and then the other with the use of said cut-off, and thus to show whether the said boat would run the longer under the same circumstances with or without the use of said cut-off; and that the said proportion of earnings so as aforesaid ascertained should be paid by said defendants *to said defendants* to said plaintiffs, weekly or monthly, or whensoever said defendants should be requested to pay the same; and, thereupon, the said plaintiffs, relying on said promises and undertakings of said defendants, and at their request, at great cost, to wit, at the cost of two hundred and twenty-five dollars, did cause and procure the firm of T. W. & B. C. Smith, of Alexandria, to construct and apply to said engine of said steamer Columbia said machine called "Sickles cut-off," which said machine
30 ever since, to wit, from the ninth day of November, in the year eighteen hundred and forty-four, continually, to the bringing of this action, hath been used by said defendants in and upon said boat, attached to the engine thereof. And the said plaintiffs aver and say that, therefore, to wit, on the eighteenth day of August, in the year eighteen hundred and forty-five, at the county aforesaid, they gave notice to said defendant that, on the next day, that is to say, on the twentieth day of August, in the same year, they desired to make the experiment in said agreement mentioned, to ascertain the amount of fuel

saved by the use of said "Sickles cut-off," and for that purpose that one of said plaintiffs would go from the city of Washington, in the District of Columbia, to the city of Baltimore, in the State of Maryland, in the said steamboat on the said day, to wit, the twentieth day of August before mentioned, for the purpose of making said experiment; and the said defendants
31 then and there, by their president, did assent thereto, and did direct the officers of said boat, or some of them, to aid in conducting said experiment. And the said plaintiffs further say that one of said plaintiffs, to wit, the said Truman Cook, did, on said twentieth day of August, A. D. 1845, proceed in said boat, from said city of Washington to said city of Baltimore, and did, on the said voyage, with the assistance of the officers of said boat, make the said experiment, by taking two piles of wood of equal dimensions, and under like circumstances, using one pile of wood without, and the other pile of wood with, the said cut-off in operation. The pile of wood used without the said cut-off, being in operation, was burned in two hours and seven minutes; the engine making twenty-one revolutions per minute, and the pile used while the Sickles cut-off was in operation, lasted three hours and fifteen minutes, the engine making the same number of revolutions, to
32 wit, twenty-one per minute, showing a saving in favor of said cut-off of thirty-four and one hundred and seventy-five one hundred and ninetieth per cent.; of all of which the said defendants afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice. And said plaintiffs aver that a great quantity of fuel has been saved to said defendants by the use of said "Sickles cut-off," on the engine of said steamboat Columbia, from said ninth day of November, in the year eighteen hundred and forty-four, to said nineteenth day of March, in the year eighteen hundred and forty-six, to wit, the amount of one thousand cords of wood, of great value, to wit, of the value of twenty-five hundred dollars. And said plaintiffs say that they are entitled to have and recover of said defendants, as a part of said savings, as well the said sum of two hundred and twenty-five dollars, for the cost of constructing and applying said cut-off to
33 the engine on said steamboat, as also the further sum, to wit, the sum of nineteen hundred and seventy-five dollars, the value of three-fourths of the fuel saved to said defendants, (after deducting the cost of making and applying said cut-off as aforesaid,) by the use of said cut-off on the engine of said steamboat of defendants during the period of time aforesaid, to wit, from said 9th day of November, A. D. 1844, to said 19th day of March, A. D. 1846. And, whereas, also, afterwards, to wit, on the first day of March, in the year eighteen hundred and forty-six, at the county aforesaid, in consideration that the said plaintiffs, who were the owners of the patent-right to a certain machine, designed to effect a saving in the consumpsion of fuel by steam-engines, at the special instance and request of said defendants, who were the owners of a certain steamboat called the Columbia, had, before that time, constructed and applied one of said machines to the engine of said boat, and had agreed that said defendants should have the use of
34 said cut-off on the engine of said boat during the continuance of their patent-right, if said boat should last so long, they, the said defendants, undertook, and then and there, faithfully promised the said plaintiffs to pay them so much money, as they therefore reasonably deserved to have of the said defendants, when they, the said defendants, should be thereunto afterwards requested. And the said plaintiffs aver that they reasonably deserved to have of said defendants the further

sum of five thousand dollars, to wit, at the county aforesaid, whereof the said defendants afterwards, to wit, on the day and year last aforesaid, had notice. And whereas, also, the said defendants afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, were indebted unto said plaintiffs in the further sum of five thousand dollars, lawful money, for so much money, by the said defendants before that time had and received to and for the use of said plaintiffs; and, being so indebted, afterwards, to wit, on the day and year aforesaid, undertook, and then and there faithfully promised said plaintiffs to pay them the said last-mentioned sum of money, when they, the said defendants, should be thereunto afterwards requested. And whereas, also, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, in consideration that said plaintiffs, who were the owners of the patent-right for a certain machine designed to effect a saving in the consumption of fuel by steam-engines, at the special instance and request of said defendants, who were the owners of a certain steamboat called the Columbia, had before that time, constructed and attached one of said machines to the engine of said boat, and had agreed that said defendants should have the use of said cut-off on the engine of said boat during the continuance of their patent-right, if the said boat should last so long, the said defendants undertook and agreed to pay to said plaintiffs the cost of constructing and applying said cut-off to the engine of said boat, to wit, the sum of $225 out of the value of the first savings effected by its use; and thereafter, and after having paid said sum of $225, the cost of constructing and applying said cut-off to said engine, to account for and pay to said plaintiffs, weekly or monthly, or whenever they should be so requested by said plaintiffs, the three-fourths of the value of the fuel saved to said defendants by the use of the said cut-off on said boat, as long as the said patent-right of said plaintiff should continue, if the said boat should last so long. And at the afterwards, to wit, on the day and year last aforesaid, at the county , a great quantity of fuel, to wit, one thousand cords of wood, of great value, to wit, of the value of $2,500, had been saved to said defendants; yet the said defendants, not regarding their said promises and undertakings, but contriving and intending to injure and defraud the plaintiffs in this behalf, have not rendered any account of the value of the savings effected by the use of the cut-off as aforesaid, and although often requested by said plaintiffs, to wit, on the day and year last aforesaid, and often afterwards, have hitherto refused, and still refuse so to do; yet the said defendants have not paid the said several sums of money before mentioned, or any part thereof, although often requested so to do, to wit, on the day and year last aforesaid, at the county aforesaid, and often afterwards; but the same to pay, or any part thereof, have hitherto wholly refused, to the damage of said plaintiffs, in the sum of $5,000, and therefore they sue, &c.

JOS. H. BRADLEY,
Plaintiffs' Attorney.

And the said docket-entries, refer'ed to in defendants' second bill of exceptions, being extended, will appear as follows:

Plea of non-assumpsit.—Issue joined.

Whereupon the said defendants, by their attorney aforesaid, defend the wrong and injury, when, and so forth, and say that they did not assume upon themselves in manner and form as the

aforesaid plaintiffs above against them have declared, and of this they put themselves upon the country; and the aforesaid plaintiffs, by their attorney aforesaid, in like manner, and so forth. Therefore, let, &c.

Verdict.

Whereupon a jury being duly impanneled and sworn to say the truth of and upon the premises aforesaid, upon their oath do say that the said defendants did assume upon themselves in manner and form as the aforesaid plaintiffs above against them have declared, and they assess the damages of the said plaintiffs, sustained by occasion of the non-performance of the promise and assumpsion aforesaid, to the sum of sixteen hundred and ninety-five dollars and seventy-nine cents, current money, with interest from 16th March, 1846.

Motion for judgment.—Judgment.

39 Whereupon the said plaintiffs, by their attorney aforesaid, pray judgment against the said defendants upon the first count in the declaration in and upon the verdict aforesaid, by the jurors aforesaid given in the form aforesaid; therefore it is considered by the court here that the said plaintiffs recover against the said defendants on the said first count in the declaration aforesaid, as well the sum of sixteen hundred and ninety-five dollars and seventy-nine cents, current money, with interest from sixteenth of March, eighteen hundred and forty-six, the damages aforesaid, by the jury aforesaid, in form aforesaid, assessed to be sustained, by occasion of the non-performance of the promise and assumption aforesaid, as the sum of dollars by the court here unto them, the said plaintiffs, on their assent adjudged, for their costs and charges by them about their suit in this behalf laid out and expended; and the said defndants, in mercy, &c.

40 *Defendant's third exception.*

After the evidence stated in the aforegoing exception, made part hereof, the plaintiffs proved by Captain Mason Weems that, in 1845 or 1846, he was captain of the steamer Planter, plying between Baltimore and the Patuxen' River, and that he was acquainted with the value and operation of the apperatus called Sickles' cut-off, and then offered to prove by said witness that, at that time, the apperatus known as Sickles' cut-off was applied to said steamer Planter, and that it produced a great incre'se of steam-power in and upon the machinery of said steamer, and the defendant objected to the admissibility of said evidence as offered; but the court overruled said objection, and allowed said offered proof to be given to the jury; and thereupon the defendant excepts, and this its bill of exception is signed, sealed, and enrolled this 3d March, 1871.

D. K. CARTTER, [SEAL.]
Chief Justice.

41 *Defendant's fourth exception.*

The plaintiffs then offered to show by the evidence of Charles Reeder that he was present at experimental trials of the "Sickles cut-off," as compared with the "throttle cut-off," in the year 1845 or 1846, on board

the steamboats Pocahontas, Columbus, and Thomas Jefferson, and that, as compared with the "throttle cut-offs" previously in use on said steamboats, the "Sickles cut-off" was an improvement, and that the result of said trials showed a saving of fuel in favor of said "Sickles' cut-off" of forty-two, twenty-eight, and sixteen per cent. on board said steamboats, respectively; to which evidence the defendant objected, but the objection was overruled, and the evidence allowed to be given to the jury; to which ruling the defendant excepts, and prays the court to sign, seal, and cause to be enrolled this its fo'rth bill of exceptions, which is done accordingly this third day of March, 1871.

D. K. CARTTER, [SEAL.]
Chief Justice.

42 *Defendants' fifth exception.*

At the further trial of this cause the plaintiffs, to show the value of the hire of the machine in question, offered evidence tending to show that the steamboat Columbia, using the "Sickles cut-off," consumed the same or a less quantity of wood, notwithstanding that, in the spring of 1845, her wheels were enlarged, and, in the winter of 1850, her bow was lengthened twenty-five feet, the freight incre'sed in weight, and, to show such increase, offered evidence to show that the receipts from freight increased from $8,675, in 1846, to $29,936, in 1855; to all and every part of which offered evidence the defendant objected, but the court overruled said objection, and allowed all the evidence offered to be given to the jury; to which ruling the defendant excepts, and prays the court to sign, seal, and cause to be enrolled this its fifth bill of exceptions, which is done accordingly this fourth day of
43 March, 1871.

D. K. CARTTER, [SEAL.]
Chief Justice.

Defendant's sixth exception.

The plaintiffs then offered the evidence of Joseph H. Bradley to show that he was counsel for the plaintiffs at a former trial of this cause, and that Job Carson, a witness at said trial, testified as follows: That, sometime in the month of August, 1845, the plaintiffs and the officers of the said boat, including the captain and engineer thereof, with others, made an experiment between the "throttle cut-off," being the machine which had theretofore been used, and was then on the engine of the said steamer, to determine whether the latter would save more fuel than the former, and, if so, how much; that said experiment was fairly made by taking two equal piles of wood, giving the choice thereof to the
44 officers of the boat, to be burned with the "throttle cut-off," and the other to be burned with the "Sickles cut-off" applied to the engine; that the pile selected for the "throttle" burned two hours and seven minutes: the engine and furnace was then put in the same condition as when the "throttle" was used, and the remaining pile was burned with the "Sickles," and lasted three hours and fifteen minutes, making a difference of $34\frac{175}{190}$ per cent., the engine making twenty-one revolutions per minute with each cut-off, and the wind, water, and tide being the same; to which offered evidence the defendant objected, which objection was overruled, and the evidence allowed to be read to the jury; to which ruling the defendant excepts, and prays the court to sign, seal, and cause to be enrolled this its sixth bill of exceptions, which is done accordingly this fourth day of March, 1871.

D. K. CARTTER, [SEAL.]
Chief Justice.

45 *Defendant's seventh exception.—Plaintiff's statement.*

On the trial of this cause, after the ruling of the court in the last exception made a*a* part hereof, the plaintiffs, to maintain the issue on their part joined, with the permission of the court, read in evidence the record referred to in the defendant's second bill of exception, in the trial of a certain cause in this court, between the same parties, touching the same subject-matter, to wit, the use of the same machine by the defendant, for a time previous to that covered by this action, as follows, to wit, (see this record annexed to defendant's second bill of exceptions, page 25 of this record.) And further gave in evidence the patent for the *for the* said machine granted to Frederick E. Sickles on the 20th day of May, 1842, as follows, to wit, (set out at end of this statement.)

They further gave evidence to prove repeated experimental trips
46 on different steamboats to ascertain the saving of fuel by "Sickles' cut-off" over the "throttle cut-off," and that the saving ranged from 16 to 42 per cent. They also gave evidence to show that "Sickles' cut-off," for the use of which this action is brought, was put on board the steamer Columbia, belonging to the defendants, at their request, in the year 1844, and was continued thereon until May, 1856, when the patent expired; that, some time in the month of August, 1845, the plaintiffs and the officers of the said boat, including the captain and engineer thereof, with others, made an experiment between the "throttle cut-off," being the machine which had theretofore been used, and was then on the engine of the said steamer, to determine whether the latter would save more fuel than the former, and if so, how much; that said experiment was fairly made, by taking two equal piles of wood, giving the choice thereof to the officers of the boat, to be burned with the "throttle cut-off," and the other to be burned with the "Sickles
47 cut-off" applied to the engine; that the pile selected for the "throttle" burned two hours and seven minutes. The engine and furnace was then put in the same condition as when the "throttle" was used, and the remaining pile was burned with the "Sickles," and lasted three hours and fifteen minutes, making a difference of $34\frac{17}{100}$ per cent., the engine making twenty-one revolutions per minute with each cut-off, and the wind, water, and tide being the same. They further gave evidence to show that, in the spring of 1845, while said "Sickles cut-off" was on said boat, her wheels were raised and enlarged, and in the winter of 1850, her bow was lengthened twenty-five feet, and her capacity to carry freight incre'sed, and she always ran pretty full. They further proved the quantity of wood consumed on board the said boat from 19th October, 1846, to 11th December, 1855, and the value of the freight during the same time, showing that the freight increased in money
48 from $8,675, in 1846, to $29,936 per year in 1855, and the cost of the wood during the same period was $57,340. And they claimed to receive, moreover, from the defendant in this action, such compensation for the use of the said machine on board said boat from October, 1846, to the bringing of this suit, as the jury shall find they are justly entitled to.

And further evidence was given upon the cross-examination of experts produced by the defendant, tending to show that the experiment made on the steamboat Columbia, if fairly conducted, was a fair and proper mode to test the relative value of the "throttle cut-off" and the "Sickles cut-off," and that, theoretically, the saving by said "Sickles cut-off," over that effected by the "throttle cut-off, was from twenty to forty per cent., but that neither of said experts had witnessed any com-

the steamboats Pocahontas, Columbus, and Thomas Jefferson, and that, as compared with the "throttle cut-offs" previously in use on said steamboats, the "Sickles cut-off" was an improvement, and that the result of said trials showed a saving of fuel in favor of said "Sickles' cut-off" of forty-two, twenty-eight, and sixteen per cent. on board said steamboats, respectively; to which evidence the defendant objected, but the objection was overruled, and the evidence allowed to be given to the jury; to which ruling the defendant excepts, and prays the court to sign, seal, and cause to be enrolled this its fo'rth bill of exceptions, which is done accordingly this third day of March, 1871.

D. K. CARTTER, [SEAL.]
Chief Justice.

42 *Defendants' fifth exception.*

At the further trial of this cause the plaintiffs, to show the value of the hire of the machine in question, offered evidence tending to show that the steamboat Columbia, using the "Sickles cut-off," consumed the same or a less quantity of wood, notwithstanding that, in the spring of 1845, her wheels were enlarged, and, in the winter of 1850, her bow was lengthened twenty-five feet, the freight incre'sed in weight, and, to show such increase, offered evidence to show that the receipts from freight increased from $8,675, in 1846, to $29,936, in 1855; to all and every part of which offered evidence the defendant objected, but the court overruled said objection, and allowed all the evidence offered to be given to the jury; to which ruling the defendant excepts, and prays the court to sign, seal, and cause to be enrolled this its fifth bill of exceptions, which is done accordingly this fourth day of
43 March, 1871.

D. K. CARTTER, [SEAL.]
Chief Justice.

Defendant's sixth exception.

The plaintiffs then offered the evidence of Joseph H. Bradley to show that he was counsel for the plaintiffs at a former trial of this cause, and that Job Carson, a witness at said trial, testified as follows: That, sometime in the month of August, 1845, the plaintiffs and the officers of the said boat, including the captain and engineer thereof, with others, made an experiment between the "throttle cut-off," being the machine which had theretofore been used, and was then on the engine of the said steamer, to determine whether the latter would save more fuel than the former, and, if so, how much; that said experiment was fairly made by taking two equal piles of wood, giving the choice thereof to the
44 officers of the boat, to be burned with the "throttle cut-off," and the other to be burned with the "Sickles cut-off" applied to the engine; that the pile selected for the "throttle" burned two hours and seven minutes: the engine and furnace was then put in the same condition as when the "throttle" was used, and the remaining pile was burned with the "Sickles," and lasted three hours and fifteen minutes, making a difference of $34\frac{75}{90}$ per cent., the engine making twenty-one revolutions per minute with each cut-off, and the wind, water, and tide being the same; to which offered evidence the defendant objected, which objection was overruled, and the evidence allowed to be read to the jury; to which ruling the defendant excepts, and prays the court to sign, seal, and cause to be enrolled this its sixth bill of exceptions, which is done accordingly this fourth day of March, 1871.

D. K. CARTTER, [SEAL.]
Chief Justice.

45 *Defendant's seventh exception.—Plaintiff's statement.*

On the trial of this cause, after the ruling of the court in the last exception made a *a* part hereof, the plaintiffs, to maintain the issue on their part joined, with the permission of the court, read in evidence the record referred to in the defendant's second bill of exception, in the trial of a certain cause in this court, between the same parties, touching the same subject-matter, to wit, the use of the same machine by the defendant, for a time previous to that covered by this action, as follows, to wit, (see this record annexed to defendant's second bill of exceptions, page 25 of this record.) And further gave in evidence the patent for the *for the* said machine granted to Frederick E. Sickles on the 20th day of May, 1842, as follows, to wit, (set out at end of this statement.)

They further gave evidence to prove repeated experimental trips
46 on different steamboats to ascertain the saving of fuel by "Sickles' cut-off" over the "throttle cut-off," and that the saving ranged from 16 to 42 per cent. They also gave evidence to show that "Sickles' cut-off," for the use of which this action is brought, was put on board the steamer Columbia, belonging to the defendants, at their request, in the year 1844, and was continued thereon until May, 1856, when the patent expired; that, some time in the month of August, 1845, the plaintiffs and the officers of the said boat, including the captain and engineer thereof, with others, made an experiment between the "throttle cut-off," being the machine which had theretofore been used, and was then on the engine of the said steamer, to determine whether the latter would save more fuel than the former, and if so, how much; that said experiment was fairly made, by taking two equal piles of wood, giving the choice thereof to the officers of the boat, to be burned with the

"throttle cut-off," and the other to be burned with the "Sickles
47 cut-off" applied to the engine; that the pile selected for the "throttle" burned two hours and seven minutes. The engine and furnace was then put in the same condition as when the "throttle" was used, and the remaining pile was burned with the "Sickles," and lasted three hours and fifteen minutes, making a difference of $34\frac{175}{180}$ per cent., the engine making twenty-one revolutions per minute with each cut-off, and the wind, water, and tide being the same. They further gave evidence to show that, in the spring of 1845, while said "Sickles cut-off" was on said boat, her wheels were raised and enlarged, and in the winter of 1850, her bow was lengthened twenty-five feet, and her capacity to carry freight incre'sed, and she always ran pretty full. They further proved the quantity of wood consumed on board the said boat from 19th October, 1846, to 11th December, 1855, and the value of the freight during the same time, showing that the freight increased in money
48 from $8,675, in 1846, to $29,936 per year in 1855, and the cost of the wood during the same period was $57,340. And they claimed to receive, moreover, from the defendant in this action, such compensation for the use of the said machine on board said boat from October, 1846, to the bringing of this suit, as the jury shall find they are justly entitled to.

And further evidence was given upon the cross-examination of experts produced by the defendant, tending to show that the experiment made on the steamboat Columbia, if fairly conducted, was a fair and proper mode to test the relative value of the "throttle cut-off" and the "Sickles cut-off," and that, theoretically, the saving by said "Sickles cut-off," over that effected by the "throttle cut-off, was from twenty to forty per cent., but that neither of said experts had witnessed any com-

petitive or comparative trial of said two cut-offs. And further, by documentary testimony introduced by the defendants, evidence was
49 given tending to prove that said "Sickles cut-off" was attached to the engine of the steamer Columbia for a portion of the savings to be effected thereby, as appears by document marked "A." (See defendant's statement.)

The plaintiffs claimed to have attached the Sickles cut-off machine to the engine of the steamboat Columbia, in pursuance of the contract set out in the first count of the declaration in the record, read in evidence, but the fact of such contract, as well as the validity thereof was denied by the defendant, and the court excluded all parol evidence of such contract, holding the same unenforceable, under the statute of frauds.

Patent.

The United States Patent-Office, to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records
50 of this office of letters-patent issued to F. E. Sickles, on the twentieth day of May, eighteen hundred and forty-two.

In testimony whereof I, Joseph Holt, commissioner of patents, have caused the seal of the Patent-Office to be hereunto affixed, this third day of February, in the year of our Lord one thousand eight hundred and fifty-eight, and of the Independence of the United States the eighty-second.

[L. S.] J. HOLT.

No. 2631.

The United States of America to all to whom these letters- patent shall come:

Whereas Frederick Ellsworth Sickles, New York, has alleged that he has invented new and useful improvements in the manner of constructing the apperatus for lifting, tripping, and regulating the closing of the valves of the steam-engines, which he states has not been known or used before his application; has made oath that he is a citizen of the United States; that he does verily believe that he is the original
51 and first inventor or discoverer of the said improvements, and that the same has not, to the best of his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the sum of thirty dollars, and presented a petition to the Commissioner of Patents, signifying a desire of obtaining an exclusive property in the said improvements and praying that a patent may be granted for that purpose: These are therefore to grant, according to law, to the said Frederick Ellsworth Sickles, his heirs, administrators, or assigns, for the term of fourteen years, from the twentieth day of May, one thousand eight hundred and forty-two the full and exclusive right of making, constructing, using, and vending to others to be used, the said improvements, a description whereof is given in the words of the said Frederick Ellsworth Sickles, in the schedule hereunto annexed, and is made part of these presents.

[L. S.] In testimony whereof I have caused these letters to be made patent, and the seal of the Patent-Office has been hereunto affixed.

Given under my hand, at the city of Washington, this twentieth day of May, in the year of our Lord one thousand eight hundred and forty-two, and of the Independence of the United States of America the sixty-sixth.

DANIEL WEBSTER,
Secretary of State.

Countersigned and sealed with the seal of the Patent-Office.

HENRY L. ELLSWORTH,
Commissioner of Patents..

The schedule referred to in these letters-patent and making part of the same.

To all whom it may concern:

Be it known that I, Frederick Ellsworth Sickles, of the city of New York, in the State of New York, have invented certain improvements in the manner of constructing and arranging the apparatus for lifting and tripping the valves of steam-engines, and by which the steam can be more readily cut off, at any desired portion of the stroke, than by the means heretofore adopted; and also an improved water-reservoir and plunger, which serves to prevent the slamming of the valves in closing, and, consequently, to preserve them in good working order for a great length of time. In the accompanying drawings A A, Fig. 1, represents a valve-box, containing the puppet-valves which are to be lifted and closed, the construction of this part being such as is well known to engineers and machinists. B is the valve-stem, passing through a stuffing-box, C, on the bonnet D of the valve-box. The valve-stem is to be raised by the lifter E, which is acted on in the usual way. F F is a spring which is attached to the shaft G of the lifter, and the outer ends, F, of which embrace the sides of the valve-stems B. The upper end of this stem is flattened, or has projecting edges or feathers, *a a*, which, when the valve is being lifted rest upon the upper edges of the spring F F, where said feathers terminate; but, when this spring is opened the stem will be no longer sustained by it, and it will consequently descend, and the valve or valves attached to it will be closed. By means of the apparatus, which I have devised, the spring F may be opened, and the stem B, with its valves, may be tripped at any time during the ascent or descent of the lifter, and the stem may consequently be cut off at any part of the stroke of the piston. To effect this there is a standard, H, rising vertically from the valve-box, or bonnet C, so as that its upper flat end shall be nearly in contact with the outer ends of the springs F F. This standard sustains an adjustable sliding piece, I, which may be shifted to any desired hight, and then held in place by means of a set-screw, *a'*. Upon the face of this sliding piece there are two projecting wedge-formed pieces or inclined planes *b b*, which serve to open the ends E of the springs, and thus to liberate the stem B. In the position in which the piece I is represented in this figure, the ends of the spring F would catch against the outside of the pieces *b b* in ascending, and they would be seperated; but, in descending, the ends of said springs would catch against the insides of the wedges or planes *b b*, and they would consequently be forced inwards and would not be opened by the ascent, but would be opened by the descent of the stem. When the stem is liberated or tripped at its greatest rise, the steam will be cut off

at half stroke; when tripped at one-half its rise in ascending the steam will be cut off at one-fourth of the stroke; and when at the same point in descending it will be cut off at three-fourths of the stroke, and so on of any intermediate point. The face of the standard H may be graduated so as instantaniously to set the cut-off at any required point by means of the set-screw.

In order to cause the stem B, to descend instantaniously when the spring F F is opened, I cause a spring to bear upon it, which spring is situated on the upper side of the lifter, to which it is attached by one end, whilst its other end bears upon the stem. In Fig. 2, which is
56 a vertical section, through the lifter, and the valve-stem *c c*, is a spring which is fastened to the lifter at *d*, whilst its outer end bears on an offset, *d'*, on the stem, and serves to give it a descending impulse the moment it is freed from the spring F'. Fig. 3 is a top view of the lifter, the bonnet, and some of their appendages, as designated by the letters of reference.

J, Fig. 1, is the water-reservoir attached to the lower side of the valve-box A. This and the parts within it, are shown in section in Fig. 4, for the purpose of clearly exhibiting their construction and arrangement. B is a continuation of the valve-stem, and this has affixed to it on its lower end a plunger or piston K. The interior of the reservoir J is cylindrical, and it has within it a cup or secondary reservoir, which may be raised or lowered by means of a graduating screw, *e e*, said screw being furnished with a nut, *f*, by which it is to be held in place. When
57 the valve-stem B descends, the plunger K enters the cup or secondary reservoir L, into the upper cylindrical part of which it passes freely, and to such depth as may be found necessary, which is determined by means of the graduating screw *e e*. The reservoir J is to contain water, oil, or other fluid, say to two-thirds of its hight, more or less. Through the plunger K, holes *g g*, are represented as being made for the passage of water; and *h*, is a valve-like piece, which slides up and down on the lower end of the stem B. This part of the apparatus, however, may be varied in its form in numerous ways—the intention being to cause the water to offer a determined degree of obstruction to the descent of the plunger, and to admit of this being regulated. This I have sometimes done, by making a plunger, K, a flat disk, with a sufficient space between it and the cavity of the cup L, for the passage of a portion of water, sufficient to allow of the descent of the plun-
58 ger, which it shall be so obstructed as to take off the force of the blow of the valve. I have, in fact, essayed the action of the plunger, and of the parts within which it operates, in different forms, and in all with good effect—that which I have represented being one of the best. An opening, furnished with a stopper, may be made through the reservoir, as at I, to supply water when requisite. By means of this apparatus the valves may be made to shut so silently as scarcely to be heard, whilst the retardation is so perfectly graduated as not to be accompanied by any sensible loss of time, as it takes place in the last moment of their descent only.

Having thus fully described the nature of my improvements in the apperatus for lifting and tripping the valves of steam-engines, and of thereby cutting off the steam at any required part of the stroke, and also of my improved apparatus for regulating the closing of the valves, what I claim therein as new, and desire to secure by letters-patent, is:

59 First. The manner in which I have combined and arranged the valve-stem B, the spring F on the lifter, the adjustable sliding-piece I, with its wedges or inclined planes, and their immediate append-

ages, so as to co-operate with each other, and to effect the tripping of the valves and the cutting off the steam, substantially in the manner set forth.

I also claim the manner of regulating the closing of the valves, and of effectually preventing them from slamming, by means of a water-reservoir, furnished with a piston or plunger, attached to the lower end of the valve-stem, and operating with an adjustable cup or secondary reservoir, so as to effect the purpose intended, upon the principal and substantially in the manner herein described and made known.

FREDERICK ELSWORTH SICKLES.

Witnesses:
W. JAY HASKETT.
W'M M. B. SICKLES.

60 *Defendant's statement.*

And the defendant having shown on the cross-examination of Charles Reeder, (one of the witnesses who testified to the experimental trials mentioned in the statement of the plaintiffs, and to the saving thereat of from sixteen to forty-two per cent,) that the said experimental trials were on board the steamboats Pocahontas, Columbus, and Thomas Jefferson, in 1845 or 1846, and that at said trials a new Sickles cut-off machine was tried against a throttle cut-off, which had been in use from fifteen to eighteen years on the Pocahontas, ten years on the Columbus, and about one year on the Thomas Jefferson, and that said trials afforded no reliable results as to the commercial value of the Sickles cut-off, but merely showed the saving effected by said cut-off as compared with the throttle cut-off belonging to said steamboats, respectively, and under the conditions existing at the times
61 of said trials, the defendant then showed that the proprietors of the Pocahontas paid for the licence to use the patent of the plaintiffs during the entire term thereof, a patent fee of $1,000, the proprietors of the Columbus, for a similar licence a like sum; and the proprietors of the Thomas Jefferson, for a similar licence the sum of $600. The defendant further gave evidence tending to show that the experiment on board the steamboat Columbia, mentioned in the plaintiffs' statement of the evidence, was fraudulent and unreliable, Truman Cook, one of the plaintiffs, making said experiment, and inducing the employés of the defendant to indulge in intoxicating liquors.

The defendant further gave written evidence to show every sale made during the existence of the patent, of the licence to use the patent on board of different boats; and that the patent-fee charged to licensees under said sales, which were numerous, ranged from $250 to
62 $1,500, but, on no occasion, exceeded the latter sum; and further that the owners of the patent did not keep the patent-right off the market, but, on the contrary, availed of all opportunities offered of disposing of licences to use the patent.

The defendant further showed that the saving of the Sickles cut-off over the throttle cut-off was in consequence of the former cutting off steam at the cylinder of the engine, whereas the throttle cut-off operated two or three feet from the cylinder, whereby there was some loss of steam and its efficiently, as there was also from the liability of the throttle cut-off, from its mode of construction and operation and from wear, to leak; but that the principal of cutting off at the cylinder was not the property of the plaintiffs, having been in use long before the issue of the patent, and that among the machines invented for cutting

off at the cylinder was Stevens's cut-off, which was in use in
63 1844, and the cost whereof was $500; and that the theoretical difference in economy between the Sickles cut-off and Stevens' cut-off, both cutting off at the cylinder, could not be more than three or four per cent., owing to the former being adjustable up to half-stroke, and cutting off instantaniously, but that the latter, from certainty of action, and freedom from liability to get out of order, was preferred to the former, and was in use on the majority of steamboats.

The defendant further gave evidence tending to show that there was no saving of wood effected by the use of the Sickles cut-off on board the steamboat of defendants, and read in evidence to the jury the following:

The United States Patent-Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the files of this office.

In testimony whereof I, D. P. Holloway, Commissioner of
64 Patents, have caused the seal of the Patent-Office to be hereunto affixed this twenty-seventh day of November, in the year of our Lord one thousand eight hundred and sixty-one, and of the Independence of the United States the eighty-sixth.

[SEAL.] D. P. HOLLOWAY.

Statement of case and of receipts and expenditures under the patent.

In the matter of the petition of Frederick Ellsworth Sickles for the extention of his patent, granted on the 20th day of May, 1842, for improvements in the manner of constructing the apparatus for lifting, tripping, and regulating the closing of the valves of steam-engines.

Hearing the 5th day of May, 1856, before Hon. Commissioner of Patents.

I, Frederick Ellsworth Sickles, of the city, county, and State of New York, being duly sworn, do depose and say that I am the person
65 named in said petition; that I verily believe that I am the original and first inventor of the improvement patented to me as aforesaid.

That I have always deemed the said improvements of great value, and now believe that they have been worth, in the saving effected by them to the country, millions of dollars.

That I deem my said invention to be substantially set forth and claimed in the specifications annexed to my letters-patent.

That I still believe myself the original and first inventor of said improvements. That I became acquainted with Truman Cook about the beginning of the year 1838, and after I had fully conceived the invention of the said improvement. That I was, at that time, nineteen years of age, and dependent entirely upon my daily labor for support. That I was then an apprentice at the machine business, at three dollars a week. That the said Cook appeared to take an interest in ma-
66 chinery and in myself; and that I, about the date last named, explained to said Cook, by drawings and otherwise, the nature of my said improvements. That the said Cook, being a practical steam-engineer, was so much pleased with my ideas, that, on the eleventh day of January, 1842, I entered into a contract with him, by which he became half owner of the prospective patent, as consideration of his pay-

ing the expenses of obtaining said patent, which it was utterly impossible for me to do at that time, as I had no means which I could devote to such purpose, without suffering for the necessities of life.

That, from the date of the grant of said patent, to wit, 20th of May, 1842, up to the 5th day of August, 1848, I was diligently and exclusively engaged with the said Cook in the preparation of drawings of the said improvements, in experiments, and in efforts to demonstrate its practical value, and to secure its introduction into public use. That, in these efforts, I was greatly aided by the experience, energy, and
67 acquaintance of the said Cook, by whose exertions, united with my own, the said improvements were first experimentally applied, under his and my direction, to the steamer Charter Oak, at a loss of three hundred dollars in money, and three months of my time.

That neither I nor the said Cook were engaged in any other business up to the 5th day of August, 1848, when I dissolved my connection with him by virtue of an agreement of that date, and recorded in the Patent-Office on the 8th day of August, 1848; that our whole time was engaged in business incidental to the introduction of the said improvements into use; that, owing to the prejudices then existing against the practicability of said improvements, we were compelled, in many cases, to make practical tests of them, thereby consuming much time and subjecting us to great expense.

That the said Cook was charged exclusively as to the management of the pecuniary affairs of the patent, in which I did not interfere, being wholly occupied in the preparation of working drawings for the introduction of the improvements, and in superintending the work.
68

That, during the time I was associated as aforesaid with said Cook, the sums charged in the annexed account against the patent, as received from the Government of the United States, were paid; that, during this time, we both resided in the city of Washington, (although Cook was necessarily about a great deal looking after our interests elsewhere,) and were subjected to great expense in feeing agents and attorneys before the Departments, through whose instrumentality we hoped to secure the introduction of the invention into the public service, and in experiments, with a view to satisfy the officers of the United States steam-engineer corps, and others, whose favorable opinion it was necessary to obtain, of the value and practicability of said improvements.

That I consider the amounts charged for expenses as reasonable and verily believe the same to have been actually paid.

That I have made no charge against the patent of the account of said Cook, for his time and services, although, of course, his
69 services were not to be obtained without a fair remuneration, he being a steam-engineer in good standing, and a person in whom many people placed great confidence.

That I am positive I did not receive, from the use and sale of the said patent, during the time I was associated with said Cook, more than the amount hereinafter stated.

That I am informed by said Cook and believe that he did not keep any regular books of account, but that he paid his own and my expenses out of the funds derived from the sale of the right to use the said invention, and that when he had no such funds he either borrowed money or ran in debt for our necessary expenses, and repaid the same so soon as money was received from sale of rights under the patent; that, having full confidence in said Cook, I never required any

70 regular account from him, as I generally knew from his statements how we stood; that, among the expenses charged against the patent while in the hands of Sickles & Cook, will be found the sum of $6,500, paid agents at Washington. Twenty-five per cent. of all our contracts with the Government went into the hands of agents, without whom we found it impossible at that time to succeed; those made since were made by me in my own name, and the proceeds paid W. B. Sickles. That, on the 5th day of August, 1848, the said Cook and I united in a conveyance of the whole right, title, and interest in the said patent, (as well as in another patent granted to me on the 19th day of September, 1845,) to my brother, W'm B. Sickles, which will be found recorded in the U. S. Patent-Office; in liber R 1, page 438 of Transfers of Patent Rights.

That we were compelled to take this course on account of judgments existing against said Cook, and suits commenced against me for debts of Cook assumed by me; that said Cook had had his property seized
71 and sold for debt, and we feared he would be imprisoned, and as he held an unconditional power of attorney from me, I was very glad to get the title in the hands of my brother, fearing that the said Cook would sell the whole thing out at a great sacrifice in order to get a discharge from his creditors; that the suits against me were small when compared with those against Cook, but I was indorser for Cook at that time.

That, since said conveyance, I have had no direct interest in said patent, but have acted as the agent of my brother, devoting my time to the making of sales of rights under the patent, receiving the money and paying it over to my brother.

That I verily believe that every dollar which has been paid by the public for the use of the patent will be found stated in the annexed account; that the amount estimated and charged against the patent is, I verily believe, within the actual outlay.

72 That although the account shows the sum of $65,522.73 gross receipts from the patent, and of gross expenditures of $14,000, leaving a balance of $51,522.73 as net profit from the patent, yet, of that amount I do solemnly declare I have received not more, in any shape or form, than $23,000. The balance is due me from the parties with whom I have been connected since I obtained the patent. So much thereof, if anything, which might appear upon a full settlement with said Truman Cook, as due me from him, I have voluntarily relinquished, by my discharge of him in August, 1848, and I therefore consider that the patent is justly chargeable with all the sums paid Sickles & Cook. The causes which led to that settlement have been explained above.

That, on the 11th day of March, 1844, said Cook and I executed a conveyance to John F. Rodman, of one-third of everything that should be realized out of the patent. The condition of that sale was that I was to be a partner in the firm of Rodman & Co.—in fact the firm
73 was, for a short time, Rodman, Sickles & Co.; but, within a few months, they failed, being *being* insolvent at the time of the sale; that I never received a dollar in consideration of that sale, and if any money was paid Cook by them as part consideration, it never came to my knowledge; that assignment of one-third of the prospective profits of the patent fell into the hands of Daniel Barnum, and by him held until the 18th day of September, 1849, when it was bought back for the sum of $1,500. (See expenditures of W'm B. Sickles on account of the patent.)

That I am informed and believe that the amount expended by Thurston, Gardner & Co. for law expenses since they became interested under the patent exceed twelve thousand dollars, which sum is not charged against the patent, because I have no knowledge of their profits, (or that they have made any,) and is only mentioned here to show with how much energy infringements have been prosecuted. It is as well to mention that, in addition to the $6,000, they covenanted to
74 defend the patent from trespassers.

That all sums received on account of rights under said patent were also in full payment for the right to use the improvements patented by me in 1845, excepting a few of the earliest sales, and the sum of six thousand dollars credited to Thurston, Green & Co., (the sale was originally to Cha's T. James, and by him transfer'ed to them,) was in full for the exclusive right to use for land-engines the patents of 1842 and 1845, and also for the patent granted to me for controlling motive power on the 12th of September, 1848, and another improvement not yet patented; that all the receipts since 24th February, 1852, were in full for the right also to use the patent granted to me on that date for improvements in the trip motion; that the patent is now about to expire; that it is now and has been ever since 1848 extensively infringed; that suits were instituted shortly after the grant of the patent, some of which are undecided still; that, nothwithstanding the verdict of a
75 jury in favor of the validity of my patent, I have failed, after years of litigation, to obtain a writ of injunction against the chief infringers of my rights, the persons who will probably be the principal opponents of my petition for extention. This, the principal suit, commenced in 1849, yet remains undecided, and my patent will probably expire before it can be brought to a final hearing and adjudication. With the expiration of the patent the power of the court to grant an injunction ceases, and with it all hopes of relief, except by actions for damages in each case of infringement.

That, during the whole term of this patent, I have been engaged in no other business; that my whole time has been occupied in efforts to introduce this invention into public use, and to obtain from it (and from other improvements in steam-engines resulting directly or indirectly from it) a support for my family and myself; that I have
76 barely done so; that I possess no property whatever; and, after devoting fifteen of the best years of my life to the patent, I can truly say that I am not worth a dollar in the world; that I am not conscious of having neglected my own interests in any particular; that, if I have, it has been the result of ignorence, of an unbusiness-like turn of mind, and want of early education.

That I should have been entirely unable to make this application and to meet the op'osition which will doubtless by arrayed against my petition for want of pecuniary means; that, being well aware that unlimited means, great talent, and indefatigable energy will be brought to bear to defeat my petition, I feel compelled to make some sacrifise with *with* the view to fortify my own case and enable me to resist those who would defeat me, and accordingly am free to confess that I have entered into a contract with Messrs. Thurston, Gardner & Co., (successors to Thurston, Green & Co., of Providence, R. I.,) by which they are
77 to aid me in this petition, and to pay all expenses of every nature in any manner connected with it, and, if successful, I have contracted to give them, as a consideration, the exclusive right to use the patent during the extended term for land-engines, contenting myself with the remuneration which I expect to derive from its use on steam-vessels.

That this, my statement required, would have been sooner filed if I could have obtained all the information necessary to make it as full and clear as I wished and as the law contemplates; but, being obliged to send to different parts of the country at a season of the year when traveling was greatly impeded, it has been for this and other reasons delayed until now.

That, as I am desirous of showing every dollar which has been paid to any person whatever by the public for the use of this invention, whether I was benefited by it or not, I append a list of sums which, I am informed by said Truman Cook and verily believe, were col-
78 lected by him from and after the 7th day of August, 1848, under a power of attorney given him by W'm B. Sickles on that day, (the power was revoked on the day of August, 1851,) viz:

From the Wilmington and Raleigh Railroad Company	$2,000
From New York and Charleston Steamship Company	1,250
From Capt'in Arthur Edwards, of Detroit, Michigan	1,800
From James Abbott, do. do.	600
	$5,600

That the said Cook has never accounted for these sums, and that I have not received any of the money so paid said Cook, and that I am informed by my brother that he has not.

That I verily believe the following to be a full and true account of all moneys paid by the public for the use of the patent sought to be extended, (including the patent of 1845) to Sickles & Cook, joint owners, up to August, 1848, viz:

From Joseph E. Coffee	$1,000
79 Allaire Works	600
Secor & Co.	350
Archimedes Works	250
New Haven Steamboat Company	250
New Jersey Transportation Company	350
Powhatan Steam-Packet Company	1,000
Frenchtown and New Castle Turnpike and Steamboat Company	1,600
W'm Whilden & Son	1,000
Steamer Maryland, of Baltimore	1,000
Steamer Thomas Jefferson	700
Steamer Osceola, Washington	1,000
Steamer Phenix, Washington	500
Steamer Curtis Peck	1,000
Richmond, Fredericksburg, and Potomac Railroad and Steamboat Company	500
From Michael Hen	2,000
United States War Department	1,900
From United States Navy Department	17,433
United States Treasury Department	1,250
Total	$33,683

That I verily believe the following sums were paid out by
80 Sickles & Cook up to August, 1848, for expenses justly chargeable to the patent, and that the aggregate is within the actual amounts expended, viz:

To cost of obtaining the patent, model, traveling expenses, and fees of Dr. Jones as agent	$300
To cost of printing circulars, handbills, &c., and circulating them	900
To cost of lithographs, &c.	300
To money paid agents at Washington and elsewhere, for obtaining contracts from the Government and services general'y	6,500
To expenses of lawsuits (about)	1,500
To estimated cost of traveling expenses of S. & C., up to 5th of August, 1848, being about 5½ years	3,000
Total	$12,500

Leaving the sum of $21,183, net profits under the patent up to the 5th day of August, 1848, without making any charge for my or Cook's time, exclusively devoted to the business.

That I verily believe the following to be a full and true account
81 of moneys paid by the public, (and received by W'm B. Sickles,) for the use of the patent sought to be extended, (including the patent of 1845, and others specifically referred to,) up to the date of my affidavit hereunto annexed, viz:

From Stephen Whitney	$400 00
" Mary Washington	400 00
" Cambridge	400 00
" Baltic	500 00
" Union	250 00
" James Adger	250 00
" Ferry-boats, New York	6,000 00
" Steamers at Philadelphia	1,800 00
" Steamer Tennessee	400 00
" Baltimore steamers	1,200 00
16th October, 1852, Thurston, Green & Co.	6,000 00
From Navy Department, viz:	
1851. July 7	1,780 98
1852. February 5	2,700 00
1852. February 21	3,927 00
1852. August 14	4,418 00
1853. February 11	1,413 75
Total	$31,839 73

82 That I am informed and believe the following is a full and true account of expenditures of W'm B. Sickles up to the date of my affidavit, hereunto annexed, viz:

Paid D. Barnum for repurchase of right, as hereinbefore stated	$1,500 00
Paid the deponent (T. E. S.) up to this date	15,169 86½

That, in the year 1844, the said Cook and I entered into an agreement with the owners of the steamer Columbia, of Washington, D. C., to put one cut-off on said boat at our own expense, in consideration of a por-

tion of the saving effected by it. This contract passed to my brother, W'm B. Sickles, in 1848, and was by him sold to George Mattingly, of Washington, for the sum of four hundred dollars. This amount is not included in the above account, for the reason that if Mr. Mattingly does not pay the expense of putting on the cut-off, I may be held liable for it.

And further this deponent saith not.

FREDERICK ELSWORTH SICKLES.

83 Sworn to this 26th February, 1856, before me.

PETER T. MARSELIS,
Commissioner of Deeds.

In the matter of the application of Frederick E. Sickles for the extention of the patent granted to him on the 20th day of May, 1842, for improvements in the manner of constructing the apparatus for lifting, tipping, and regulating the closing of the valves of steam-engines.

The invention covered by this patent is commonly known as the drop-valve cut-off. The means upon the lifter for elevating the valve, which, as set forth in the patent, are a pair of springs lying on either side of a horizontal arm attached to the lifter, at certain points of the movement are brought in contact with adjustable studs upon a standard, whereby the valve-stem is liberated and the puppet-valve dropped in its seat.

The force of the fall of the valve is broken by means of a plunger attached to its stem, and moving with a dash-pot having a supple-
84 mental adjustable bottom. The dash-pot should contain "water, oil, or other fluid."

When the application for this patent was first acted upon in this office it was rejected, on the ground that the invention claimed was in use on the steamboats North and South America, and others running in and about the harbor of New York. Upon an affidavit made by Truman Cook that the invention on the South America was placed in that boat subsequent to the date of an anonymous letter addressed to Mr. Cunningham, which letter was written by Mr. Sickles and returned to the address therein named, and which, with the affidavit of Cook, will be found in Sickles patent-file in this office, the action of the examiner upon the application was by himself reversed, and passed for the issue of a patent thereon. This anonym'us letter is dated 4th May, 1841, and the letter of Mr. Cunningham returning it bears date 7th May, 1841. The testimony of Isaac Newton, Cornelius A. Delamater, George Birkbeck, Robert Robinson, and others, the same being part of those taken and filed in this office, and bearing upon the extension of this patent,
85 show that the South America entered upon her regular trip to Albany by the 15th of April, 1841, with the invention of this patent in use and in fair serviceable condition; and it thus appears that had these statements been made at the time of the examination of the application, that the objections to the grant of the patent first raised would have been sustained, and the patent would not have been granted. The testimony of John Middleton, a witness in the suit of Sickles vs. Young and Cutler, of E. W. Smith, of John Sickles, and others here, bearing upon the invention, as being with W'm Sickles as early as the winter of 1839-'40, E. W. Smith's statements are quite definite to the fall of 1840, the other witnesses are not as definite nor clear to other dates.

In addition to the statements made in relation to the inventions being on the engine of the South America, come in the statements made by

Isaac Newton, George Birkbeck, jr., Cornelius A. Delamater, and others, concerning the drop-valve cut-off made for the steam-balloon.

These statements carry the invention to the winter of '38–'9,
86 and years '39–'40, and attribute it to Peter Hogg—i. e., so far as regards the drop-valve cut-off upon the dash-pot; with the adjustable bottom the evidence is neither full or clear. From the full reading of the testimony, and which is quite voluminous, it appears that Mr. Sickles is not the original and first inventor of the drop-valve cut-off and dash-pot, as covered by the claims allowed him in the patent which is the subject of this application for extension.

In making this report I do not dwell upon the cut-off of the steamer Dispatch, as built for the Bennett engine and put in operation on board of that boat in 1838, for the reason that I do not regard it as substantially the same as the cut-off involved in this application; nor do I dwell upon the means for operating valves and dash-pot as set forth in Tredgold on the Steam-Engine and Stuart's "Anecdotes of Steam-Engines," for the reason that there is nothing contained therein which strictly can be applied as an off-set to the invention of the drop-
87 valve cut-off. Faxy's work on the steam-engine named in the first paper filed by the remonstrant to the extension, is not in the library of this office, and I have not been able to obtain a copy of it from any source to which I have applied. I should have stated in the earlier part of this report that W'm Sickles' application for the patent of this invention was filed 3d May, 1842, and that the caveat upon which the application was based bears date 11 January, '42. Of the other questions involved under an application for the extension of a patent, they can all, as applied to the application, be answered affirmatively. The invention of the drop-valve cut-off is one of much merit, value, and usefulness. It is evident from the papers filed on this application, that Mr. Sickles has given earnest attention to the introduction of the invention. What amount or sums of money have been paid to him and his assignees does not fully appear. The entire interest of the patent has not, for any more than a brief period, been
88 vested in Mr. Sickles. It has been in several hands, and been made the subject of several transfers. No statements are on file of receipts and expenditures from any one of the several parties holding or having held a part or whole of the patent except the statement of the patentee. The sum of net profits, as set forth by this paper, amounts to $21,183.

Respectfully submitted,

THO'S T. EVERETT.

Hon. CHARLES MASON,
Comm'r of Patents.
MAY 3, 1856.

And further read in evidence the following deeds from Truman Cook to F. E. Sickles, dated December 11, 1846, and from F. E. Sickles to W'm B. Sickles, dated August 5, 1848, with annexed certificate of Commissioner of Patents:

The United States Patent-Office to all persons to whom these presents shall come, greeting:

89 This is to certify that the annexed are true copies from the records of this office.

In testimony whereof I, D. P. Holloway, Commissioner of Patents, have caused the seal of the Patent-Office to be hereunto affixed this

fourteenth day of October, in the year of our Lord one thousand eight hundred and sixty-two, and of the Independence of the United States the eighty-seventh.

[SEAL.] D. P. HOLLOWAY.

[G. 108.]

This indenture, made this eleventh day of December, in the year one thousand eight hundred and forty-six, between Truman Cook, of the city of New York, of the one part, and Frederick Ellsworth Sickles, of the same place, of the other part.

Whereas the said Frederick E. Sickles hath invented a new and improved method of cutting off steam in steam-engines, known as Sickles' cut-off, for which he obtained letters-patent of the United States,
90 bearing date the twentieth day of May, one thousand eight hundred and forty-two; and whereas, by articles of agreement, bearing date the eleventh day of January, of the same year, the said Frederick E. Sickles, for the consideration therein named, did assign, transfer, and set over unto the said Truman Cook, his heirs, administrators, and assigns, one-half of the interest of the said Sickles in the said patent when granted, and all subsequent improvements to be made in the same invention; and whereas the said Frederick E. Sickles is desirous of being possessed of the entire interest in the said invention and of the letters-patent granted as aforesaid to secure the same, and the said Truman Cook is desirous of purchasing the interest of the said Sickles in certain other inventions, to wit, "Frederick E. Sickles' improvement in the method of opening and closing the valves of steam-engines," which was patented on the nineteenth day of October, one thousand eight hundred and forty-three, which it is agreed between the
91 said parties he is to receive for the transfer to the said Sickles of his interest in the said cut-off:

Now this indenture witnesseth that the said Truman Cook, for and in consideration of the premises and of the sum of one doller to him in hand paid by the said Frederick Ellsworth Sickles, at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, hath granted, assigned, transfer'ed, and set over, and by these presents doth grant, assign, transfer, and set over unto the said Frederick Ellsworth Sickles, his executors, administrators, and assigns, all the estate, right, title, and interest of the said Truman Cook in the said invention known as Sickles's cut-off, and in the letters-patent granted by the United States on the twentieth day of May, one thousand eight hundred and forty-two, to secure the same, with all and singular the rights, liberties, privileges, and appurtenances whatesover thereunto belonging or in any wise appertaining: To have, hold, exercise, and enjoy the same, to the said Frederick Ellsworth Sickles, his exe-
92 cutors, administrators, and assigns, for and during all the term for which the said letters-patent were granted, and for all other the term and interest of the said Truman Cook therein, in as full and beneficial a manner, to all intents and purposes as he, the said Truman Cook, might or would have held and enjoyed the same if these presents had not been made.

In witness whereof the said Truman Cook hath hereunto set his hand and seal this eleventh day of December, one thousand eight hundred and forty-six.

TRUMAN COOK. [SEAL.]

Sealed and delivered in the presence of *us*.
A. THO. SMITH.

UNITED STATES OF AMERICA,
District of Columbia, City and County of Washington, ss:

Be it known that, on this eleventh day of December, in the year one thousand eight hundred and forty-six, before me, the subscriber, a notary public, duly commissioned and qualified, personally appeared
93 the above-named Truman Cook, who is to me well known, and acknowledged the foregoing instrument of writing to be his act and deed, for the uses and purposes therein mentioned,

In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year aforesaid.

[SEAL.] A. THO. SMITH.
Notary Public.

Received and recorded January 16, 1847.

[R. 438.]

Whereas, on the twentieth day of May, one thousand eight hundred and forty-two, letters-patent was granted by the Government of the United States of America to Frederick E. Sickles, of the city, county, and State of New York, for a steam cut-off; and whereas, on the nineteenth day of September, one thousand eight hundred and forty-five, the said Government granted to the said Sickles a patent for an improvement on the said former invention; and whereas the said
94 Sickles and Truman Cook, of the city, county, and State of New York, are now equal and joint owners of the said patent: Now, therefore, this agreement witnesseth that the said Sickles and Cook, for and in consideration of the sum of one dollar to each paid by William B. Sickles, of the said city, county, and State of New York, the receipt whereof is hereby acknowledged by the said Sickles and Cook, and for and in consideration of the services heretofore rendered by the said William B. Sickles to the said Sickles and Cook, the said Frederick E. Sickles and the said Truman Cook, hereby sell, assign, transfer, and set over unto the said William B. Sickles, his heirs and assigns, the said mentioned patents, and all and every emolument and profit that can or may be derived by virtue thereof, whether for past infringements or other interests that may accrue therefrom.

In witness whereof we have hereunto affixed our seals and signed our names this fifth day of August, one thousand eight hundred and forty-eight.

FREDERICK E. SICKLES. [SEAL.]
TRUMAN COOK. [SEAL.]

95 Signed, sealed, and delivered in presence of witnesses—
D. M. HUDSON.
W'M J. KING.

UNITED STATES OF AMERICA,
State of Maryland, to wit:

I, David W. Hudson, notary public, by letters-patent under the great seal of the State of Maryland commissioned and duly qualified, residing in the city of Baltimore, in the State aforesaid, do hereby certify, attest, and make known, that, on the day of the date hereof, before me, personally appeared Frederick E. Sickles and Truman Cook, they having been proven by oral testimony, under oath before me, to be the

persons named and described as and professing to be the parties to the foregoing instrument, transfer, or bill of sale, and each for himself acknowledged the same to be his act and deed, according to the true intent and meaning thereof of which an act having been of me requested, I have granted these presents, to serve and avail as need or occasion may require.

96 In testimony whereof, I have hereunto set my hand and affixed my notarial seal, this fifth day of August, in the year of our Lord eighteen hundred and forty-eight.

[SEAL.] D. W. HUDSON,
Notary Public.

Received and recorded August 8, 1848.

And thereupon the defendant prayed the court to instruct the jury as follows:

DEFENDANT'S FIRST PRAYER.

That the evidence aforesaid does not sustain either count of the declaration.

DEFENDANT'S SECOND PRAYER.

If, from the whole evidence, the jury shall find, that in 1844, the plaintiffs, owners of the patent given in evidence, attached, or caused to be attached to the engine of the steamboat Columbia, belonging to the defendant, the patented machine under, as claimed by the plaintiffs
97 and denied by the defendant, a parol contract which was not to be performed until the end of the patent, then such contract was not capable, under the statute of frands, of enforcement by either party. It created neither rights nor obligations, and plaintiffs were at liberty to take back or recover the said machines; and if the jury shall find further that they failed to do so, or demand the return of the same, upon or after the denial of said contract by the defendant, and its refusal to be bound thereby, but allowed the same to remain on said engine and in the possession of the defendant, and that said machine was subsequently and during a period for which damages are claimed in this action, used by the defendant, then, in the absence of any special contract, the law did not imply a contract of hiring on the part of the defendant, and the plaintiffs are not entitled to recover as for the hire of said patented machine.

DEFENDANT'S THIRD PRAYER.

98 That, if the jury find the facts stated in the second prayer, then the remedy of the plaintiffs was either for the recovery of the patented machine, or an action for infringement of the patent by the use of the machine, and they are not entitled to recover in this action.

DEFENDANT'S FOURTH PRAYER.

That, if the jury find the facts stated in the second prayer, then, if the plaintiffs could waive the tort, and seek redress upon an implied contract, the contract implied by law was a contract to pay for the value of the machine, including the right to use the invention involved in it,

(in which case a recovery would vest the machine and the right to use the same in the defendant,) and not a contract of hiring, so as to enable the plaintiffs to recover for the use of the machine and invention in an action of assumpsit, whilst still retaining the right of property to both the machine and invention.

FIFTH PRAYER.

99 If the machine contracted by the plaintiffs under the patent, and attached to the engine of the Columbia, was used by the defendant without the licence of the plaintiffs, then the only remedy for such use was an action on the case for infringement.

2 §. If the plaintiffs licensed such use, then, in the absence of any special contract in respect of payment, or the terms upon which the use should be had, the law did not imply from such license and use a contract to pay as for the hire of the patented machine.

3 §. If the use of the defendant was under a licence incapable of enforcement, because of the statute of frauds, the plaintiffs could recover back the patented machine attached by them to the engine of the defendant in furtherance of such licence, and could revoke such license, and for the subsequent use of the machine sue for an infringement of the patent.

4 §. And, even if the plaintiffs could, were entitled to sue for
100 infringement, waive the tort, and sue in assumpsit upon a contract implied by law for the use of the machine, such contract would be to pay for the value of the machine, including the right to use the same to the end of the patent, and not a contract to pay hire for the use of the machine, leaving in the plaintiffs the right of property to the machine and invention involved in its use.

SIXTH PRAYER.

That the legal effect of the deed given in evidence from Truman Cook to Frederick E. Sickles, dated the 11th of December, 1846, was to transfer to the latter all title of the former to the patent, and that any contract to pay implied by law for the use by the defendant of the patented machine was implied by the delivery of said deed in favor of Frederick E. Sickles as owner of the patent, and that the plaintiffs are not entitled to recover in this action for such use after the delivery of
101 said deed; and the fact that the patented machine was attached, or caused to be attached to the steamboat of the defendant by the plaintiffs, under a parol contract with the defendant, which was not to be performed until the end of the patent, and which could not therefore be enforced, will not cause such implied contract to inure to the benefit of the plaintiffs jointly after one of them had assigned his title to the patent to the other.

SEVENTH PRAYER.

That the legal effect of the deed given in evidence from Frederick E. Sickles to William B. Sickles, dated the 5th of August, 1848, was to transfer to the latter all title of the former to the patent, and that any contract to pay implied by law from the use by the defendant of the patented machine was implied in favor of the owner of the patent, and that the plaintiffs are not entitled to recover in this action for such use after they, or either of them, ceased to be owners or owner of the patent.

EIGHTH PRAYER.

That, in this action, the plaintiffs are entitled to recover reasonable compensation for the use of the patented machine, and the measure of damages is what others pay for the same use, at or about the same time, and the sales given in evidence involving the right to use machines constructed under the same patent, during its term, if the jury shall find the same, furnish the measure of damages to which the plaintiffs are entitled.

NINTH PRAYER.

That the burden of proof is upon the plaintiffs to satisfy the jury what others paid for the right to us*ing* machines under the same patent as the machine for the use of which compensation is claimed in this action; and that there is no evidence tending to prove that the plaintiffs did not sell licenses whenever an oppertunity was offered.

103

TENTH PRAYER.

That, in this action, the plaintiffs are not entitled to recover for profits accruing to the defendant from the use of the patented machine, whether such profits consisted in the saving of wood or in the capacity for carrying larger freight with the same wood, or in the saving of time, or otherwise.

ELEVENTH PRAYER.

That it is not competent for the jury to render in this action a larger compensation for the use of the patented machine than if, at the commencement of the period for which compensation is claimed by the plaintiffs, the plaintiffs had sold to the defendants a license to use the machine without any agreement as to price, and were now su'ing for the price of such license.

Which prayers, and each of them, as prayed, except the tenth, the court refused to give; but gave the tenth, and the first and third
104 clauses of the fifth prayer; and to the refusal of the court to give each of the said prayers rejected, and to give the tenth prayer as prayed, the defendant excepted, and prayed the court to sign, seal, and cause to be enrolled this its seventh bill of exceptions, and that this bill of exceptions, shall have the same effect as if said prayers rejected in whole or in part had each been severally excepted to, which is granted this 10th day of March, 1871.

D. K. CARTTER, [SEAL.]
Chief Justice.

Defendant's eighth exception.

After the ruling of the court set forth in the preceding exception, made part hereof, the defendant further prayed the court to instruct the jury as follows:

FIRST PRAYER.

That the court instruct the jury that, by the legal effect of the assignment read in evidence from Truman Cook to Frederick E. Sickles,

dated the 11th day of December, 1846, the title of the legal plaint-
105 iffs in this action to the original patent read in evidence by the plaintiffs was divested, and they are not competent to maintain this action to recover compensation for the use of the apparatus called Sickles' cut-off, as described in said patent, from and after the said 11th day of December, 1846.

SECOND PRAYER.

That there is no evidence in this case of a valid special contract between the plaintiffs and defendant, other than the statement in the affidavit of F. E. Sickles, in reference thereto, and no recovery can be had on said statement, because it does not show what proportion of the savings made by said Sickles cut-off was payable by the defendant, and because there is no special count on said special contract so set forth in said affidavit.

THIRD PRAYER.

106 That this action is brought for the use of said Sickles cut-off, and, in considering the claim of the plaintiffs to recover for said use, it is competent and proper for the jury to consider the rate of compensation charged and received by the plaintiffs for the use of the same cut-off, on other steamboats, and the jury ought not to award a larger rate of compensation for such use than the highest rate so charged and received by the plaintiffs.

FOURTH PRAYER.

If the jury find that the defendant has already paid the plaintiffs the sum of $1,695, for the use of said Sickles cut-off, on the steamer Columbia, and that said amount is more than the plaintiffs ought reasonably to claim for the use of said cut-off from the time of its application to the machinery of said steamer to the expiration of said patent, then the plaintiffs are not entitled to recover in this action any further sum for the use of said cut-off on said steamer.

107 FIFTH PRAYER.

If the jury believe from the evidence that the defendant's boat, the Columbia, did not use a less quantity of wood after the Sickles cut-off was attached than before, then it is not competent for the jury to speculate as to the possibility or probability of what said cut-off might have saved, if the wheels of said boat had not been raised and enlarged, or its length and freights increased.

And the court gave the second, fourth, and fifth of said prayers, but refused to give the first and third, and to the refusal to give said prayers and each of them, the defendant excepted, and prayed the same benefit as if the rejection of each of said prayers had been severally excepted to, which is allowed, and that this, its eighth bill of exceptions be signed, sealed, and enrolled, which is done this tenth day of March, 1871.

D. K. CARTTER, [SEAL.]
Chief Justice.

108 *Defendant's ninth exception.*

After the rulings of the court as stated in the aforegoing exceptions, made a part hereof, the plaintiffs pray the court to instruct the jury as follows:

PLAINTIFF'S FIRST PRAYER.

That, if the use by the defendants was under a license incapable of enforcement, because of the statute of fraud, the defendant was at liberty to discontinue the use of that machine at any time at their pleasure, and return it to the plaintiffs; but, if they elected to continue to use it, notwithstanding the statute of frauds, the law raises an implied contract that they will pay for its use on demand, a reasonable compensation, so long as they continue to use it, at least up to the expiration of such patent.

PLAINTIFF'S SECOND PRAYER.

If the jury believe from the evidence that, when the plaintiff's
109 were the joint owners of the letters-patent mentioned in the declaration, they constructed a machine in accordance therewith, and at the request of the defendant placed that machine on board of the steamer Columbia, for their use, for such a period as the defendant might choose to continue such use, *then the defendant might choose to continue such use*, then the defendants are liable to pay for such use, for the period they chose to retain and use that machine, a reasonable compensation, but they were at liberty at any time to return the machine to the plaintiffs, and discontinue its use, and any further payment therefor.

PLAINTIFF'S THIRD PRAYER.

If the owner of the patent constructed a machine in accordance therewith, and conveyed to the defendant the right to the use of that machine for a reasonable compensation, to be paid for the time it
110 should be used, then the patent-right because incorporated with the machine and inseparable from it, so long as the machine lasted, and the sale of the patent afterwards did not affect the right of the owner of that machine to continue to use it; nor did it affect any contract which had been made between the owners of that machine to continue to use it; nor did it affect any contract which had been made between the owners of that machine and the user of it to pay for such use; and if the user of it, under an agreement existing at the time of the sale of the patent, had chosen to discontinue its use and return it to its owners, such owners would be entitled to continue the use of it themselves, or to authorize any other person to use it, notwithstanding the sale and assignment by them of the patent, and neither they nor the persons authorized by them to use it would be liable to the assignee of the patent for the continued use of such machine.

111 Which rulings the court granted; and to said rulings the defendant excepts, and prays the court to sign, seal, and cause to be enrolled this its ninth bill of exceptions, which is done this 10th day of March, 1871.

D. K. CARTTER. [SEAL.]
Chief Justice.

Defendant's tenth exception.

After the rulings of the court, as set forth in the preceding exceptions, made a part hereof, the court then charged the jury as follows:

CHARGE OF THE COURT.

If the jury should find from the testimony that the parties, in 1844, met together, and, by mutual arrangement, agreed to attach the Sickles cut-off to the machinery of the Columbia, in contemplation of payment for its use, and shall further find that the machinery was so at-
112 tached and continued to be used during the period covered by the term specified in the declaration, they will find for the plaintiffs, and proceed to estimate the plaintiffs' damages. In estimating the amount which the plaintiff is entitled to recover, the jury will take into consideration the value of the use of this machine, as far as the proof enables them to ascertain its value from the sale of the machine itself, from the license of its use, from the capacity of the machine to economize the expenditure of fuel, in the expression of the power of the engine, and from any other testimony that they may find developed in the case bearing upon the value of its use; the conclusion of value not to be confined to the price of the patent when sold, the license for its use, or the value of its economies, but to be a deduction from all, under the rule of equity and justice between parties dealing with each other in contract, and where it is expected that both are to derive advantages from their dealings.

113 To which charge the defendant prayed the following qualification:

QUALIFICATION OF CHARGE.

But the foregoing is to be taken subject to this explanation: This suit is to recover reasonable compensation for the use of the patented machine in question. The jury can allow such reasonable compensation and nothing more. The court has permitted evidence to be submitted to the jury tending to show the saving of wood effected by the machine, or that with the same wood an increase of steam-power was effected, whereby, at the same outlay, more freight could be transported, or freight could be transported in less time; but all such evidence, if believed by the jury, is to be considered by them, not as controlling the evidence given by the defendant of the sales of the licenses, or the
114 right to use similar machines, but to be considered in common with said evidence, and any other evidence of value, and solely for the purpose of ascertaining what is a reasonable compensation to be allowed for the use of the machine, and not as constituting the ground of any additional claim against the defendant.

As stated in answer to the 10th prayer of the defendant, the plaintiffs are not entitled, in this action, to recover for any forfeit accruing to the defendant from the use of the machine, in whatever such profits may have consisted, whether in the saving of wood or time, or in larger carrying power, or otherwise. Neither can the plaintiffs recover, in this action, for any injury sustained by them from the use of the machine by the plaintiffs, but can recover only a fair and reasonable compensation for such use; which qualification the court granted; and to the giving of said charge the defendant excepts, and prays the court to sign,

seal, and cause to be enrolled this its tenth bill of exceptions,
115 which is done accordingly this tenth day of March, 1871.

D. K. CARTTER, [SEAL.]
Chief Justice.

MARCH, 15, 1871.

Session resumed pursuant to adjournment, Chief Justice Cartter presiding.

FREDERICK E. SICKLES AND TRUMAN COOK, use of George Mattingly, pl'ffs, *vs.* THE WASHINGTON, ALEXANDRIA AND GEORGETOWN Steam-Packet Co., def't. } At law. No. 174. Trials, Jan'y term, 1863.

And now again come the parties aforesaid, in manner aforesaid, and the jury returned into court, and on their oath say, they find the issue above joined in favor of the plaintiffs, and that the money payable to them by the defendant, by reason of the premises, is the sum of
116 eleven thousand three hundred and thirty-three dollars, with interest, besides costs.

And thereupon the plaintiffs, by their said attorneys, move the court to enter judgment for the said sum of eleven thousand three hundred and thirty-three dollars, with interest thereon from the 11th day of December, 1855.

Motion for judgment.—Filed March 15, 1871.

In the supreme court of the District of Columbia.

FREDERICK E. SICKLES, TRUMAN COOK, USE George Mattingly, *v.* THE WASHINGTON, ALEXANDRIA AND GEORGETOWN Steam-Packet Co. } No. 174. Trials, January, 1863.

And thereupon, and upon the finding and return of said verdict, rendered on the 15th day of March, A. D. 1871, by the jury in the
117 said case, as aforesaid, the plaintiffs, by their counsel, move the court to enter judgment for the said sum of eleven thousand and three hundred and thirty-three ($11,333) dollars, with interest thereon from the 11th day of December, in the year eighteen hundred and fifty-five, (A. D. 1855.)

JOS. H. BRADLEY, JR.,
Att'y for Pl'ffs.

Cause shown against motion for judgment.—Filed March 18, 1871.

In the supreme court of the District of Columbia.

FREDERICK E. SICKLES AND TRUMAN COOK, use of George Mattingly, *vs.* THE WASHINGTON, ALEXANDRIA AND GEORGETOWN Steam-Packet Company. } At law. No. 174.

And now comes the defendants, and, for cause against the motion to enter judgment, says:

118 First. That, by the act of 1812, section 6, (2 Stat's at L, 756,) the time from which interest shall be payable, is required to be found by the verdict of the jury sworn in the cause.

Second. That no judgment can be legally entered until the motion for a new trial upon exceptions taken upon and before the trial now pending, and to be heard, in the first instance, before the court in general term, shall be so heard and determined.

Third. That, by rule No. 63, the entry of judgment is suspended by a motion for a new trial, to be heard, in the first instance, in the general term.

Fourth. That the case laid in the declaration is not sufficient to support the verdict.

Fifth. That the verdict is to' vague and uncertain to enable the entry of judgment.

W. D. DAVIDGE,
Att'y for Def't.

119 *Motion for new trial.—Filed March* 18, 1871.

In the supreme court of the District of Columbia.

FREDERICK E. SICKLES AND TRUMAN COOK, use of George Mattingly, *vs.* THE WASHINGTON, ALEXANDRIA AND GEORGETOWN STEAM-PACKET COMPANY.	At law.	No. 174.

And now comes the defendant, and moves the court here for a new trial—

1. Because of errors of law by the court in its rulings before and during the trial, and instructions to the jury, as shown by the different bills of exception taken before and upon the trial.

2. Because the evidence is insufficient to support the verdict of the jury.

3. Because the damages assessed by the jury are excessive.

W. D. DAVIDGE,
Att'y for Def't.

120 TUESDAY, *April* 20, 1871.

Session resumed pursuant to adjournment, Chief Justice Cartter presiding.

SICKLES AND COOK, USE, &C., PLAINTIFFS, *v.* STEAM-PACKET COMPANY, DEFENDANTS.	174.	Jan. term, 1863.

Upon argument of plaintiffs' motion to enter judgment on the verdict, with interest from December 11, 1855, and being fully advised therein, it is considered that the same be, and is hereby, overruled and refused.

SATURDAY, *April* 29, 1871.

Session resumed pursuant to adjournment, Chief Justice Cartter presiding.

SICKLES & COOK, USE, &C., PLAINTIFFS, *v.* STEAM-PACKET COMPANY, DEFENDANT.	174.	T. January term, 1863.

And now again come the plaintiffs, by their said attorneys, and

121 file their exception to the overruling of their motion, duly signed and sealed, and pray the same may be made a part of the record; which is done accordingly.

Plaintiffs' exception.

And, after the above case was given to the jury, the jury rendered the following verdict, viz: "On their oath say they find the issue above joined in favor of the plaintiffs, and that the money payable to them by the defendant, by reason of the premises, is the sum of eleven thousand three hundred and thirty-three dollars, with interest, besides costs;" and thereupon the plaintiffs file the following motion, viz: "And thereupon, and upon the finding and return of the said verdict, rendered on the fifteenth day of March, A. D. 1871, by the jury in the said cause, as aforesaid, the plaintiffs, by their counsel, moved the court to enter judgment for the said sum of eleven thousand three hundred and
122 thirty-three ($11,333) dollars, with interest thereon from the eleventh day of December, in the year eighteen hundred and fifty-five, (A. D. 1855.") And, upon argument thereof, and the court being fully advised therein, it was by the court considered that the said motion be, and the same was, overruled and refused; to which order the plaintiffs except, and do hereby except, and pray the court to sign, seal, and cause to be enrolled this their last bill of exceptions, which is done accordingly the twentieth day of April, A. D. 1871.

D. K. CARTTER, [SEAL.]
Chief Justice.

Proceedings before the supreme court of the District of Columbia, in general term, commencing Monday, September 25, 1871.

MONDAY, *September* 25, 1871.

By order of the justices presiding, to wit, Chief Justice Cartter, and Justices Olin, Wylie, and MacArthur, the marshal proclaims the opening of the court.

123 No. 174. Trials at January term, 1863, of the circuit court of the District of Columbia.

FREDERICK E. SICKLES AND TRUMAN COOK, for use of George Mattingly, plaintiffs,
v.
THE WASHINGTON, ALEXANDRIA AND GEORGETOWN STEAM-PACKET COMPANY, defendant.

In open court come the plaintiffs, by their attorney, on this 18th day of November, 1871, and the attorney of the defendant now being here in open court, and move the court, by way of suggestion, to amend the record in the above-entitled cause, now here in court, in these respects:

1st. That the defendant's 1st bill of exceptions be made to conform to the ruling of the court to which it relates, as appears by said ruling in said record.

2d. That the defendant's 6th bill of exceptions be made to conform to the phonographic report of the testimony in this cause, taken under the direction of the court, and upon which the defendant's statement of the evidence in his bills of exception rest, in this: That, after the

124 words in said 6th bill, "being the same," and before the succeeding words "to which offered evidence," there be inserted the words "and further gave evidence to show that said Job Carson had died since he so testified," as appears in said official report.

JOS. H. BRADLEY,
Att'y for Pl'ffs.

Which motion having been heard and duly considered, and it thereupon appearing to the satisfaction of this court that the said record is erroni'us in the respects set out in said motion, it is by the court, this 18th day of November, A. D. 1871, ordered that said record be, and is hereby returned to the justice holding the circuit term of this court at which said cause was last tried, and that he cause the same to be reformed in the respects so set forth in the plaintiff's' motion.

SATURDAY, *November* 25, 1871.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter, and Justices Wylie, Humphreys, and MacArthur.

125 No. 174. Trials at January term, 1863, of the circuit court of the District of Columbia.

FREDERICK E. SICKLES & TRUMAN COOK, FOR use of George Mattingly, pl'ffs,
vs.
THE WASHINGTON, ALEXANDRIA & GEORGETOWN Steam-Packet Company, defendant.

The court directs that the order made on the 18th instant in this cause be amended by striking out the following words at the end of said order—"and that he cause the same to be reformed in the respects set forth in the plaintiffs' motion," and insert instead thereof these words following: "That he may consider and determine whether it be proper to correct the said bills of exceptions in the respect above specified."

And to this order the defendant, by its attorney, offers the following exceptions:

This cause was tried before the chief justice, Cartter, at the circuit held on the 4th Monday of January, 1871, which term adjourned sine die on the 29th of April, 1871. A term of another circuit has since intervened. A term of this court, sitting in general term, has also intervened. The terms of the court in circuit and general term are as
126 follows: the 4th Monday of January, 2d Monday of May, and 3d Monday of October for the circuit court; and for the general term, the first Monday of January, third Monday of April, and fourth Monday of September. And to the power of this court to make the foregoing orders, or of the chief justice to change or alter the bills of exceptions filed in said cause after the close of the circuit at which the same was tried, and the intervention of terms of the courts as aforesaid, this defendant excepts, and prays this, its bill of exceptions, may be signed, sealed, and enrolled, which is done accordingly this 18th of November, 1871.

D. K. CARTTER, [SEAL.]
Chief Justice.
ANDREW WYLIE. [SEAL.]
ARTHUR MACARTHUR. [SEAL.]

Proceedings before the supreme court of the District of Columbia in general term, commencing on the first Monday and first day of January, 1872.

127 MONDAY, *January* 1, 1872.

By order of the justices present, to wit, Chief Justice Cartter, and Justices Olin, Wylie, Humphreys, and MacArthur, the court is opened by proclamation of the marshal.

THURSDAY, *January* 18, 1872.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter, and Justices Olin, Wylie, Humphreys, and MacArthur.

No. 174. Trials at January term, 1863, of the circuit court of the District of Columbia.

FREDERICK E. SICKLES & TRUMAN COOK, FOR use of George Mattingly, pl'ffs,
v.
THE WASHINGTON, ALEXANDRIA AND GEORGETOWN Steam-Packet Company, defendant.

On the hearing of the amended order passed by this court in general term, in this cause, on the 25th day of November, in the year eighteen hundred and seventy-one, and after argument of counsel for all
128 the parties to this suit, and due inspection had by me of the record refer'ed to in said amended order, it is, this 18th day of January, in the year eighteen hundred and seventy-two, considered and determined that it is proper; and it is so ordered, that the appellant's bills of exceptions numbered one, signed on 2d March, A. D. 1871, and numbered six, signed on 4th March, A. D. 1871, be corrected in the respects specified by the appellee in his motion filed in this cause on the 10th day of November, in the year eighteen hundred and seventy-one, and now of record in this court, in second minutes of the general term, page twenty-two, in the words and figures following, to wit: "1st. That the defendant's 1st bill of exceptions be made to conform to the ruling of the court to which it relates, as appears by said ruling in said record. 2d. That the defendant's 6th bill of exceptions be made to conform to the phonographic report of the testimony in this cause, taken under the direction of the court, and upon which the defendant's statement of the evidence in his bills of exceptions
129 rests, in this, that after the words in said 6th bill, 'being the same,' and before the succeeding words, 'to which offered evidence,' there be inserted the words, 'and further gave evidence to show that said Job Carson had died since he so testified.'"

And to the above order the defendant, by its attorney, excepts, as follows:

At the hearing before me, of the order in general term, dated the 18th of November, 1871, as amended by the order in general term, dated the 25th of November, 1871, the defendant, by its counsel, objected to my want of jurisdiction and authority to make the foregoing order, bearing date this day, or to change or alter the bills of exceptions taken at the trial of the above-entitled cause. Said cause was tried before me at the circuit held on the 4th Monday of January, 1871, which term was adjourned sine die on the 29th of April, 1871. Another term of the circuit court has since intervened, and a third term is now in ses-

130 sion, Mr. Justice MacArthur holding the same; two terms of the court, in general term, have also intervened. The terms of the court, in circuit and general term, are as follows: In circuit, fourth Monday in January, second Monday of May, and third Monday of October; in general term, first Monday of January, third Monday of April, and fourth Monday of September. And to the making of said order, bearing date this day, the defendant excepts, and prays that this bill of exceptions may be signed, sealed, and caused to be enrolled; which is done accordingly, this 18th of January, 1872.

D. K. CARTTER, [SEAL.]
Chief Justice.

SATURDAY, *March* 2, 1872.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter, and Justices Olin and Humphreys.

131 FREDERICK E. SICKLES & TRUMAN COOK, use of George Mattingly, plaintiffs,
vs.
THE WASHINGTON, ALEXANDRIA AND Georgetown Steam-Packet Company, defendant.
} At law. No. 174. Trials, January term, 1863.

And now again come here, as well the plaintiffs as the defendant, by their respective attorneys, and, because it seems to the court here that there is no error in the record and proceedings of the circuit court, the defendant's aforesaid motion for a new trial is overruled; and it is thereupon considered that the plaintiffs recover against the defendant the sum of eleven thousand three hundred and thirty-three dollars, the money found to be payable by the defendant to the plaintiffs, as aforesaid, with interest thereon at the rate of six per cent. from the 15th day of March, 1871, the date of the verdict herein, and $, costs of suit, and that they have execution thereof.

132 *Bond.—Filed March* 6, 1872.

In the supreme court of the District of Columbia, the 6th day of March, 1872.

FREDERICK E. SICKLES AND TRUMAN COOK, use of George Mattingly, plaintiffs,
vs.
THE WASHINGTON, ALEXANDRIA & GEORGEtown Steam-Packet Company, defendant.
} At law. No. ., in error.

Know all men by these presents that we, The Washington, Alexandria and Georgetown Steam-Packet Co., William Gunton, and Edward Temple, are bound unto the above named Frederick E. Sickles and Truman Cook, use of George Mattingly, in the sum of twenty-five thousand dollars, ($25,000,) to be paid to the said Frederick E. Sickles and Truman Cook, use of George Mattingly, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seal and dated this sixth day of March, 1872.

Whereas the above-named The Washington, Alexandria and George-

town Steam-Packet Company, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named The Washington, Alexandria and Georgetown Steam-Packet Company shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

The Washington, Alexandria and Georgetown Steam-Packet Company, by—

W. GUNTON, *Pre't.*
W. GUNTON. [SEAL.]
EDWARD TEMPLE. [SEAL.]

Sealed and delivered in presence of—
W. D. DAVIDGE.

The above bond is approved, and ordered to operate as a supersedias.

D. K. CARTTER,
Chief Justice of the Supreme C't, D. C.

MARCH 6, 1872.

133 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment made and entered March 2, 1872, in a plea which is in the said court before you, between Frederick E. Sickles and Truman Cook, use of George Mattingly, plaintiffs, and the Washington, Alexandria and Georgetown Steam-Packet Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 6th day of March, in the year of our Lord 1872, and of the Independence of the United States the 96th.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To Frederick E. Sickles and Truman Cook, use of George Mattingly:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first

Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The Washington, Alexandria and Georgetown Steam-Packet Company is plaintiff in error, and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness the honorable David K. Cartter, chief justice of the said supreme court of the District of Columbia, this 6th day of March, 1872.

D. K. CARTTER,
Ch'f Just.

Service acknowledged this 6th of March, 1872.

JOS. H. BRADLEY,
Att'ys for Sickles & Cook, use of George Mattingly.

(Indorsed:) Filed Mar. 6, 1872. R. J. Meigs, clerk.

134 OFFICE OF THE CLERK OF THE
SUPREME COURT OF THE DISTRICT OF COLUMBIA,
November 23*d*, 1872.

I certify that the foregoing is truly copied from originals on file and of record in this office, which originals together constitute the record and proceedings of the said supreme court of the District of Columbia, in the case mentioned in the writ of error to which this certificate is annexed.

Witness my hand and the seal of said court the day and year aforesaid.

[SEAL.] R. J. MEIGS, *Clerk.*

(Indorsement on cover:) No. 265. The Washington, Alexandria and Georgetown Steam-Packet Company, plaintiff in error, vs. Frederick E. Sickles & Truman Cook, use of George Mattingly. Dist. of Columbia sup. court. Filed 26th November, 1872.

REC. 265—4

Supreme Court of the United States.

OCTOBER TERM, 1873.

No. 265.

The Washington, Alexandria, and Georgetown Steam Packet Company, Plaintiff in Error,

vs.

FREDERICK E. SICKLES and TRUMAN COOK, use of George Mattingly.

T. J. D. FULLER,
W. D. DAVIDGE,
Attorneys for Plaintiff in Error.

M'GILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

5 Wall 580–594

Supreme Court of the United States.

OCTOBER TERM, 1873.

THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM PACKET COMPANY, Plaintiff in Error,

v.

FREDERICK E. SICKLES AND TRUMAN COOK, use of GEORGE MATTINGLY.

No. 265.

This was an action of assumpsit instituted by Frederick E. Sickles and Truman Cook, use of George Mattingly, against the Washington, Alexandria, and Georgetown Steam Packet Company, on the 26th of December, 1855. (R., f. 5.)

The original declaration (R., f. 6–14) alleged that the plaintiffs, being the owners of a certain patent right for a machine called the Sickles' cut-off, designed to effect a saving in fuel in steam engines, and the defendant being the owner of a steamboat called the Columbia, running on the Potomac river and Chesapeake bay, it was, on the 18th of June, 1844, mutually agreed between the plaintiffs and defendant that the former should cause one of said machines to be constructed and attached to said steamboat at a cost not exceeding $250, which cost should be paid out of the first saving of fuel effected by the machine; that if said machine should fail to effect any saving of fuel, it should be removed at the expense of the plaintiffs; that if it should effect a saving of fuel, then the defendants would *use the machine on the engine of the Columbia "during the continuance of the patent right, if said boat should last so long,"* and would apply the value of the first saving of fuel to pay the

cost of constructing and attaching the machine, and after said payment would, "*during the continuance of said patent right, if said steamboat should last so long,*" *pay to the plaintiffs three fourths of the value* of the saving of fuel effected by the use of the machine.

That it was further agreed that the saving of fuel by the use of said Sickles' cut-off should be ascertained at such time as the plaintiffs should desire, by taking two piles of wood, equal in quantity, and using one without and the other with the Sickles' cut-off, so as to see whether the boat would run longest without or with the cut-off, *and that the proportion of savings thus ascertained should be paid by the defendant to the plaintiffs weekly or monthly, or whensoever the defendant should be requested to pay the same.*

The declaration then alleged that the plaintiffs caused the machine to be constructed and attached to the engine on the 9th of November, 1844, and that the machine had been used by the defendant from that time to the bringing of the action.

That on the 20th of August, 1845, the experiment mentioned in the agreement was made, after notice to the defendant, who assented to the experiment, and directed the officers of the boat to assist thereat. That the experiment was accordingly made by taking two piles of wood of equal quantity, and using one without and the other with the Sickles cut-off; that the pile used without the cut-off lasted two hours and seven minutes, and the pile with it lasted three hours and fifteen minutes, the engine making twenty-one revolutions per minute during the experiment; thus showing a saving in favor of the Sickles cut-off of $34\frac{74}{100}$ per cent.

The declaration then alleged that a great quantity of fuel had been saved to the defendant by the use of the cut-off, from the 19th of October, 1846, to the 26th of December, 1855, the time of the bringing of the action, to wit: 6,000 cords of wood, of the value of $15,000, and claimed that the plaintiffs were entitled to three fourths of the value of the fuel so saved.

The declaration contained but a single count. The defendant pleaded non-assumpsit, on which issue was joined. (R., f. 13.)

On the 12th of November, 1867, the plaintiffs obtained leave to amend their declaration. (R., f. 14.)

On the 4th of March, 1868, an amended declaration was filed, which wholly abandoned the special contract of the original declaration.

The amended declaration is in these words: (R., f. 14:)

"The plaintiffs sue the defendant for money payable to the plaintiffs for the *use* of a certain apparatus, patented by one Frederick E. Sickles on the 20th of May, 1842, for lifting and tripping the valves of steam-engines, and also for an improved water-reservoir and plunger.

"And the plaintiffs sue the defendant for money received by the defendant for the plaintiffs. And the plaintiffs claim $25,000."

As explanatory of the change of front exhibited by the amended *nar.* and as tending to facilitate the investigation of a controversy which is now before this court for the fourth time, it is hoped that a brief history of the different suits representing that controversy, and all of which have engaged the attention of this court, will not be deemed inappropriate.

A special contract *in parol*, similar to that set out in the above original declaration, except as to the times when payment should be made to the plaintiffs of their three-fourths of the savings, was claimed by the plaintiffs as having been made by the defendant in June, 1844. This pretension of the plaintiffs was denied by the defendant.

Such a contract is on its face most extraordinary, and it is difficult to conceive how any sane man could have entered into it.

It compelled the defendant, if there was *any* saving, no matter how little, to use the machine *during the whole term of the patent, provided the boat should last so long.*

It provided for an experiment in its nature most *fallible*, and made the result by that experiment the *infallible* test, by contract, of the saving effected, so that after the experi-

ment the consumption of fuel involved by contract a certain saving, whether there was any saving in fact or not, or, in other words, the more wood burned the greater the saving effected by the machine.

It gave the defendant but one-fourth of the constructive saving and the plaintiffs three-fourths.

Suffice it, however, that it was asserted by the plaintiffs and denied by the defendant.

The plaintiffs brought suit, in March, 1846, for the cost of constructing and attaching the machine, $250, and for three-fourths of the constructive saving of wood, from the 9th of November, 1844, when the machine was attached, to the date of suit, and recovered a judgment. The special contract then alleged did not provide for the payment to the plaintiffs of three-fourths of the saving at any fixed times, and, on a writ of error, it was held by this court that the contract was entire, and no recovery could be had until the end of the period for which, as the plaintiffs alleged, the defendant was to use the machine. The case will be found reported in 10 Howard, 419. Notwithstanding it was ruled that the plaintiffs had no cause of action, the case was remanded for a *venire de novo*. *Id.*, 441.

In delivering the opinion of the court, Judge Grier said: "If the defendants had agreed to pay by installments at the end of every week for twenty-seven weeks, doubtless the plaintiffs could have sustained an action for the breach of each promise, as the breaches successively occurred." (p. 441.)

This case next makes its appearance with an improved *nar*, the first count of which alleges that the plaintiff's proportion of saving "should be paid weekly or monthly, or whensoever said defendant should be requested to pay the same."

This count is the same as the original declaration in this suit, except that it also seeks to recover the cost of constructing and attaching a machine. There are three other counts: one on a *quantum meruit*, for constructing and attaching the machine and licensing its use; another for

money had been received; and another upon the special contract, but omitting the experiment as a provision thereof.

Under this *nar* the case was tried in November, 1855, and a verdict of $1,695.79, with interest from March, 1846, rendered for the plaintiffs.

A writ of error was sued out, but not docketed in time and the case dismissed. The record of the case will be found in the present record. (R., f. 25–40.)

In October, 1846, a second suit was instituted by the plaintiffs to recover three-fourths of the constructive saving from March, 1846, to the date of the suit; and on the 26th of December, 1855, a third, the present, suit was instituted to recover from October, 1846, to the date of suit.

At the last trial of the first suit the verdict was general; but the court, upon motion of the plaintiffs, ordered judgment to be entered upon the first count of the declaration.

At the trial of the second and third suits, the court below ruled that the defendant was estopped by the verdict and judgment in the first suit to deny any of the matters pleaded in the first count in the declaration in that suit, and, verdicts having been rendered in conformity with that ruling, and judgments entered, the two cases were brought here by writ of error. They will be found reported in 24 How., 333. The judgments were reversed, upon the ground that, the verdict in the first suit being general, it was competent for the defendant to show the state of facts that existed at the trial, with the view of determining to which count of the declaration the verdict was in fact referable, and that this right of the defendant could not be defeated by the entry of judgment upon the first count, which was allowable merely for the purpose of sustaining the verdict, and without reference to the use which might be made of the verdict and judgment as evidence in a subsequent suit. (24 How., pp. 344, 345, 346.)

In November, 1863, the second case was again tried. The record of the first suit was given in evidence by the plaintiffs, and witnesses were examined to show what was litigated before the jury. The defendant offered evidence

to show that the only evidence of any contract was parol, and hence not applicable, under the statute of frauds, to the special counts, which alleged a contract which was to continue during the continuance of the patent right, (or twelve years,) if the boat should last so long. The evidence thus offered was ruled out, and a verdict and judgment rendered against the defendant. The case was again brought here, and will be found in 5 Wallace, 580.

This court again reversed the judgment, holding that the offered evidence was improperly excluded. And in relation to the statute of frauds, Mr. Justice Nelson, delivering the opinion of the court, says: (pp. 594, 595.)

"As the case must go down for another trial, and as the validity of the contract set out in the declaration may be involved in that trial, it is proper that we should express our opinion upon it, if, as it was offered to be proved, the contract was not in writing, but rested in parol.

"We have referred particularly to the contract in the fore part of this opinion. The question raised is, whether or not it is within the statute of frauds, and therefore void.

"The law of this District, it is admitted, is a copy of the English statute on the subject. The patent had twelve years to run after the date of this contract, which was in June, 1844.

"The words of the statute are, that no suit shall be brought to charge any person upon any agreement that was not to be performed in one year, unless there was some memorandum or note in writing of the agreement, &c.

"Now, the substance of the contract is, that the defendants are to pay in money a certain proportion of the ascertained value of the fuel saved, at stated intervals, throughout the period of twelve years, if the boat to which the cut-off is attached should last so long.

"The statute applies to contracts not wholly to be performed within the year.

"It is insisted, however, that this contract is not within it, because it may, by the happening of a certain event—the loss or destruction of the boat—terminate within the year. The answer is, that the possibility of defeasance does not make it the less a contract not to be performed within the year."

After commenting on several English cases, the learned judge proceeds:

"We think the construction given in the cases referred to is sound, and adopt it. The result is, that the contract in question is void, not being in writing. It is a contract not to be performed within the year, subject to a defeasance by the happening of a certain event, which might or might not occur within that time. All the mischiefs which the statute was intended to remedy apply with full force to it."

With this decision ended the effort to recover on the special contract, and to use the verdict and judgment in the first suit as an estoppel. If the plaintiffs could have persisted longer, they concluded not to do so, and, abandoning the original declaration, filed the amended *nar* above set out for money payable for the *use* of the machine, thus setting the matter at large.

After the emphatic ruling of this court, already quoted, to the effect that the special contract was invalid under the statute of frauds, and after the plaintiffs, by the amended declaration, sought relief under the contract implied by law, it would seem that no difficulty could possibly exist in determining the principles of law by which the case was to be governed. But the sequel will show that the amended declaration was simply a change in the form of pleading—an ingenious contrivance for getting indirectly the benefit of the special contract—and that, under the rulings of the court below, in relation to the character of the contract implied by law, the evidence admissible in support of such contract, and the rule of law as to the measure of damages, the statute of frauds became practically a dead letter.

It will appear that the court held, that where A delivers to B a patented machine, in part execution of a contract, void under the statute of frauds, the law, after the refusal of B to perform the contract and his use of the machine, implies a *contract of hiring*, instead of a contract to pay the value of the machine; and that in an action of assumpsit, brought by A for the *use* of the machine, it is competent to show the capacities of the machine by comparison with

another machine the value of which is not shown, and, further, to show the benefit which B derived, or might have derived, from the use of the machine, instead of the value of the patented machine, and what others gave or would give for its hire; and that, in such action, the measure of damages is not the price for which the identical use or right to use uniformly sold, but such damages as a jury might choose to allow under all the circumstances of the case.

And the court further held, that where A delivers to B a patented machine in part execution of a contract void under the statute, and the cost of constructing and attaching the machine to the engine of B is sued for and recovered, then, upon the refusal of B to perform the contract, and making use of the machine, A can sue in assumpsit as for a hiring implied by law, instead of suing for an infringement, as provided for by the act of Congress.

On the 1st of March, 1871, the defendant pleaded the general issue and the statute of limitations—*non assumpsit infra*, and *actio non accrevit*. (R., f. 15.)

On the next day the plaintiffs moved that the pleas of the defendant be not received, and the court granted the motion as to the pleas of limitation, and ordered them to be stricken out. The defendant excepted. (R., f. 21.) First exception.

After the pleas of limitations were stricken out, a jury was sworn to try the issue *under the amended nar.*

At the trial the plaintiffs offered the record of the first suit, which was objected to. The court admitted it in evidence, but "excluded it as evidence to prove either the fact that a special contract was made between the parties in this case, or the terms thereof, or as conclusive of any other fact in the case." The ground of this action of the court was the conceded fact that the special contract was in parol. The evidence thus admitted showed that the cost of constructing and attaching the machine had passed into judgment. The defendant excepted. (R., f. 24.) Second exception.

The whole of this record was read to the jury. (R., f. 45.)

The plaintiffs further gave in evidence the letters-patent, issued on the 20th of May, 1842, to Frederick E. Sickles, (R., f. 49.) And the record, admitted as above, showed the ownership of the patent by the plaintiffs in 1844.

No evidence of any hiring was offered; but the plaintiffs claimed to have constructed and attached the patented machine to the engine of the steamboat of the defendant under the contract set out in the first count of the declaration in the record offered in evidence, which contract was in parol, and declared by the court to be invalid. (R., f. 49.)

The plaintiffs offered no evidence of the value of the patented machine, nor of the use thereof.

In lieu of such evidence, they undertook to show the saving capacities of the machine, and the benefit derived from it by the defendants during the whole term of the implied hiring; and even this was done by assuming that there were but two cut-offs known to the world—the Sickles and the throttle cut-off—and that all superiority over the latter was due to the former, and that the conditions under which cut-offs were used never varied, and by the further assumption that because the money received for freights between 1846 and 1855 largely increased, therefore the *weight* of the freight increased.

To take all the evidence adduced on this subject: a witness testified that in 1845 or 1846 the Sickles cut-off was applied to the steamer Planter, and that it produced "a great increase of steam power in and upon the machinery of that steamer." The evidence was objected to, but the objection overruled and evidence admitted. (R., f. 40, third exception.)

Another witness, Charles Reeder, was offered to prove that he was present at experimental trials of the *Sickles cut-off, compared with the throttle cut-off*, in 1845 or 1846, on board the steamboats Pocahontas, Columbus, and Thomas Jefferson, and that, *as compared with the throttle cut-offs previously in use on said steamboats*, the Sickles cut-off was an improvement, and that the result of said trials showed a saving of fuel in favor of the Sickles cut-off of 42, 28, and

16 per cent. respectively. Objection to this evidence was made but overruled. (R., f. 41, fourth exception.)

Evidence was further offered to show that the Columbia, using the Sickles cut-off, consumed "the same or a less" quantity of wood than before, although in the winter of 1845 her wheels were enlarged, and in 1850 her bow was lengthened 25 feet, and she carried an increase of freight; and to show such increase evidence was offered that the money received from freight increased, from $8,675 in 1846 to $29,936 in 1855. All this evidence was objected to, but the objection overruled and the evidence admitted. (R., f. 42, fifth exception.)

The plaintiffs then offered evidence that a witness at a former trial testified to an experiment made on board the Columbia, in August, 1845, to determine whether the throttle cut-off or the Sickles cut-off would save most fuel, and that this experiment showed that the latter would save $34\frac{75}{100}$ per cent. more than the former. Objected to, but admitted, and exception. (R., f. 43, 44, sixth exception.)

This was the whole evidence offered as to value.

The plaintiffs claimed to recover compensation for the use of the machine on board the boat from October, 1846, to the bringing of this suit.

The defendant, on the other hand, showed by Charles Reeder, on cross-examination, that at the so-called experimental trials aboard the Pocahontas, Columbus, and Thomas Jefferson, a new Sickles cut-off was tried against throttle cut-offs in use upwards of fifteen years, ten years, and about one year, and that said trials afforded no reliable results as to the commercial value of the Sickles cut-off, but merely its saving capacity, compared with that of the particular throttle cut-offs, and under the conditions existing at the trials; that the experiment aboard the Columbia was fraudulent, Cook, one of the owners of the patent, making it, and plying the employees of the defendant with liquor. (R., f. 60, 61.)

The defendant then showed that the saving of the Sickles cut-off over the throttle was owing to the former cutting

off at the cylinder, and the latter three or four feet from the cylinder, and the liability of the latter to leak, but that the principle of cutting off at the cylinder was not peculiar to the Sickles cut-off, nor the property of the plaintiffs, but had been in use long before the issue of the patent, and that among the machines cutting off at the cylinder was the Stevens cut-off, between which and the Sickles there was a theoretical difference of three or four per cent., owing to the latter being adjustable up to half stroke, and cutting off instantaneously, but that the former, from certainty of action and freedom from liability to get out of order, was preferred and in use on the majority of steamboats. (R., f. 62, 63.)

The defendant further proved that the cost of the Stevens cut-off was $500, and that the license for the Sickles cut-off, paid by the Pocahontas, was $1,000, that paid by the Columbus a like sum, and that paid by the Thomas Jefferson, $600. The defendant then gave in evidence every sale made during the existence of the patent, of the license to use the Sickles' cut-off on different boats, and showed that the license fee ranged from $250 to $1,500, but on no occasion exceeded the latter sum, and that the owners of the patent did not keep it off the market, but, on the contrary, availed themselves of all opportunities to sell licenses. (R., f. 61, 62.)

The defendant then read in evidence deeds from Truman Cook to F. E. Sickles, dated December 11, 1846, and from F. E. Sickles to William B. Sickles, conveying all the interest of the grantors in the patent. (R., f. 88 to 97.)

It further appeared that George Mattingly, the assignee of the suits, and real plaintiff, bought, in 1848, the alleged contract with the defendant for the sum of $400. (R., f. 82.)

The repudiation by the defendant of the alleged parol contract is shown by the record given in evidence. (See also defendant's statement, f. 49.)

The defendant then prayed the court to instruct the jury that the evidence did not sustain either count of the declaration. (R., f. 96.)

These counts are for the use or hire of the patented machine, and money received for the use of the plaintiffs.

The prayer was overruled, and exception, (f. 104,) and the court charged the jury that, if the parties met together in 1844, and by mutual arrangement agreed to attach the cut-off to the machinery of the defendant's steamboat, "*in contemplation of payment for its use*," and if the cut-off was so attached and used during the term specified in the declaration, then they should find for the plaintiffs.

The defendant then offered several prayers to the effect that, if the patented machine was attached by the plaintiffs to the engine of the steamboat of the defendent, under a contract void by the statute of frauds, and if, after the repudiation by the defendant of the contract, the plaintiffs failed to take back the machine or demand its return, and it was subsequently used by the defendant, then, in the absence of any special contract, the law did not imply a contract of hiring.

That the remedy of the plaintiffs, after the repudiation of the contract, was to recover back the machine, or sue for an infringment by its use, or recover its value, but that the law did not imply a contract of hiring.

Second, third, fourth, and fifth prayers, R., f. 96–101.

The court refused to instruct as prayed, but at the instance of the plaintiffs instructed the jury that the defendant was at liberty to discontinue the use of the machine, but that if the machine was used, the law would imply a contract to pay for the use a reasonable compensation so long as the use continued. (R., f. 107.) The defendant excepted. (R., f. 104, 111.)

The defendent then prayed the court in different forms to instruct the jury that the measure of damages for the use of the machine was what others paid for the identical use sued for.

Eighth prayer, f. 102.

Eleventh prayer, f. 103.

Third prayer, f. 106.

The court refused these prayers, and charged the jury (R., f. 112) that in estimating the damages they might consider "the value of the use of this machine, as far as the proof enables them to ascertain its value, from the sale of the machine itself, from the license of its use, from the capacity of the machine to economize fuel, in the expression of the power of the engine, and from any other testimony that they may find developed in the case bearing upon the value of its use; the conclusion of value not to be confined to the price of the patent when sold, the license for its use, or the value of its economies, but to be a deduction from all, under the rule of equity and justice, between parties dealing with each other IN CONTRACT, and *where it is expected that both are to derive advantages from their dealings.* The defendant excepted. (R., f. 104, 107, 114.)

The defendant further prayed the court to instruct the jury that any implied contract would enure only to the owner of the patent during the use, and that the effect of the deeds offered in evidence was to work a change in ownership.

Sixth and seventh prayers. (R., f. 100, 101.) The court refused the prayers and exceptions. (f. 104.)

The plaintiffs had shown by the record admitted in evidence that the cost of constructing and attaching the machine had been sued for and recovered, leaving nothing in the plaintiffs but the patent-right.

The jury found a verdict against the defendant of $11,333, with interest. (R., f. 115, 116.)

On motion for a new trial upon exceptions, the case went to the General Term.

In that court, the plaintiffs moved to amend the sixth bill of exceptions (f. 43) so as to show that a foundation had been laid for the introduction of evidence of the statement of a witness at a previous trial, by showing that he had deceased; and also to amend the first bill of exceptions, so as to show that the limitation pleas had not been ordered to be "stricken out," as stated in the exception, but "not received," as entered in the minutes. When this motion

was made, the term of the circuit court at which the case was tried had closed, and another had been held and closed, and a third was in progress. A term of the court in General Term had also intervened. The court in General Term referred the subject of the proposed amendments to the chief justice, "that he may consider and determine whether it be proper to correct the said bills of exception in the respect above specified." The defendant excepted to any interference with the record by either court. (R., f. 123 to 127.)

The chief justice made the alterations asked for, and the defendant excepted. (R., f. 127 to 131.)

Judgment was rendered by the court in General Term March 2, 1872, for the amount of the verdict, with interest from the date of the verdict. (R., f. 131.)

Assignment of Errors.

The court erred—

I. In ruling that where a chattel is delivered under a contract void by the statute of frauds, and the contract is repudiated by the party receiving the chattel, and the possession and use of it retained, the law will imply a contract to pay as for the use or hire of the chattel; and that, in the case of a patented machine so delivered, where the cost of the machine, apart from the patent-right, is paid for or passes into judgment, the law will imply a contract to pay for the hire or use of the patent-right; and that in the case of the use of a patented machine under a void license, the owners, after disclaimer by the party using the machine, of the contract of license, have any other remedy than that prescribed by act of Congress; that is, an action for infringement.

Second, third, fourth, and fifth prayers of the defendant, R., f. 96 to 101.

First prayer of plaintiffs, f. 108.

II. In refusing to instruct the jury that there was no evidence to support the first count in the declaration for

the use of the patented machine, nor the second count for money received to the use of the plaintiffs.

First prayer of defendant, R., f. 96.

Charge, f. 111, 112.

III. In refusing to instruct the jury that, in an action for the use of a patented machine, the measure of damages is the license fee or what others pay for the same use about the same time.

Eighth and eleventh prayers of defendant, f. 102, 103.

Third prayer, f. 106.

And in charging the jury in respect of damages as follows:

"In estimating the amount which the plaintiffs are entitled to recover, the jury will take into consideration the value of the use of this machine, as far as the proof enables them to ascertain its value from the sale of the machine itself, from the license of its use, from the capacity of the machine to economize the expenditure of fuel, in the expression of the power of the engine, and from any other testimony that they may find developed in the case bearing upon the value of its use; the conclusion of value not to be confined to the price of the patent when sold, the license for its use, or the value of its economies, but to be a deduction from all, under the rule of equity and justice between the parties dealing with each other in contract, and where it is expected that both are to derive advantages from their dealings."

IV. In striking out the pleas of limitation filed by defendant.

First exception, R., f. 21.

V. In admitting evidence to show how the saving qualities of the Sickles cut-off compared with those of the throttle cut-off, the merits and value of the latter not being shown.

Fourth and sixth exceptions, R., f. 40, 43.

VI. In admitting evidence of what a witness swore at a former trial, without proof of his death or absence, and in changing the first and sixth exceptions after the term had closed and other terms had intervened.

Sixth exception, R., f. 43; f. 123–131.

VII. In admitting evidence to show that the steamboat of defendant consumed the same or a less quantity of wood, notwithstanding her wheels were enlarged in 1845, and her bow lengthened in 1850, and to show an increase of weight in freight by showing an increase of the moneys received.

Fifth exception, R., f. 42.

VIII. In refusing to instruct the jury that any contract implied by law for the use of the patented machine would be implied in favor and inure to the benefit of the owners of the patent.

Sixth and seventh prayers, R., f. 100, 101.

Points.

First Assignment of Error.

I. The case presented to the court below, stating it most favorably to the defendants in error, was that of a chattel delivered in part execution of a contract, void under the statute of frauds, where the party receiving the chattel repudiated the contract, but retained possession of and used the chattel.

The court ruled that in such a case the law would imply a contract to pay *as for the hire of the chattel.* It is submitted to be beyond all doubt, however, that the right of the party delivering the chattel is to recover the property or its value, and no more, and that, because one special contract is void under the statute, the law does not imply another special contract, that of bailment for hire.

The principle of the law is simply one of restitution, and is applicable to whatever may have been advanced under the void contract, whether property, money, or services.

The right to recover rests upon the fact that the advances, of whatever they consist, have been made without consideration.

The special contract being void, cannot support an action. It can confer no rights and impose no obligations. Hence the remedy is either for the recovery of the specific property, or upon the common counts, under the promise implied by law.

Browne on Frauds, §§ 118, 124.

In King *v.* Brown, 2 Hill, 485, 487, Nelson, C. J., says: "The true principle is this: the contract being void, and incapable of enforcement in a court of law, the party paying the money or rendering the services in pursuance thereof, may treat it as a nullity, and recover the money or value of the services rendered under the common counts. This is the universal rule in cases where the contract is void for any cause not illegal, if the defendant be in default."

And see Mavor *v.* Pyne, 3 Bing., 285; Gray *v.* Hill, Ryan & Moody, 42; Lockwood *v.* Barnes, 3 Hill, 128; Kidder *v.* Hunt, 1 Pick., 328; Smith *v.* Administrators of Smith, 4 Dutcher, 208; Holbrook *v.* Armstrong, 10 Maine, 31; Luey *v.* Bundy, 9 N. H., 298; Barickman *v.* Kuykendall, 6 Blackf., 21.

After a thorough examination of the authorities, none can be found which gives any countenance to the rule of law laid down by the court.

The contract of bailment for hire is in its very essence special. The relation of letter to hire and hirer has no existence, except where parties have in fact entered into it.

The plaintiff in error was entitled to have the jury instructed that the law did not imply a contract for the use or hire of the machine, but that they must find that the relation of letter to hire and hirer in fact existed.

Where land is demised by parol for more than three years, and hence the contract is void, use and occupation does not lie in the absence of a contract to pay rent. (Archbold's Landlord and Tenant, pp. 153, 154; Browne on Frauds, §

38; Clayton *v.* Blakely, 2 Smith's L. C., 177–179, Smith's note.)

An equally conclusive reason against any implication by law of a contract of bailment for hire is to be found in the nature of the property and the relation of the plaintiffs to it. The property was a patented machine. As a mere piece of property it did not belong to the plaintiffs. Their own evidence (the record) showed that the cost of constructing and attaching it to the engine of the defendant had passed into judgment against the latter, and in fact it had been paid for, as is assumed in one of the rulings of the court. (f. 106.)

The defendant, it is true, had no right to use it without license; but, on the other hand, the whole interest of the plaintiffs was in the patent-right. The use of the machine without license was an infringement of the patent-right, but the law implied no contract to pay for such injury in assumpsit as for the hire of the machine. On the contrary, the same law which created the patent-right provided the remedy for the infringment of that right by action on the case or bill in equity. The remedy thus provided was the exclusive remedy.

Curtis on Patents, 4th ed., § 218.
Gaylor *v.* Wilder, 10 How., 494.
Bullins N., p. 75.
1 McAllister, 81.
Hindmand on Patents, p. 252.
Woodworth *v.* Cook, 2 Blatchf., 160.

And even if the plaintiffs had owned the machine and had delivered it to the defendant under a void license, and the defendant had used the machine, the only remedy after disclaimer would be that prescribed by the statute.

A void license is no license, and the rights and obligations of parties are as if no assignment for the use had ever been made. The penalties are remitted to the statute, and where it creates the right and prescribes the remedy, no action at common law will lie.

Second Assignment of Error.

II. There was no evidence tending to show a contract of bailment for hire, and the court erred in refusing so to instruct the jury.

The first prayer of the defendant was that the evidence did not sustain either count of the declaration. This was refused. (Rec., f. 96, 104.)

Certainly the second count, for money received by the defendant for the use of the plaintiffs, was not sustained, and may be regarded as out of the case.

The first count, for "the use of a certain apparatus, patented," &c., is the only one that need be considered.

The court below charged that, if the parties in 1844 met together, and by mutual arrangement agreed to attach the cut-off, "in contemplation of payment for its use," and that the defendant used it "during the period covered by the term specified in the declaration," (there is no such term) then the jury should find for the plaintiffs, and proceed to estimate their damages.

Now the court will look in vain for any evidence tending, however remotely, to support the contract for the use of the machine. The record admitted in evidence had been expressly excluded "as evidence to prove either the fact that a special contract was made between the parties or the terms thereof." Then what particle of evidence was there to support the count for the use or hire of the machine?

The charge implies that, although the void special contract could not regulate the rights and obligations of the parties, yet it might be used as showing generally what they had "in contemplation."

Such is not the law, however. There is no *cy-pres* process whereby the intent of a void contract can be enforced. The meaning of the statute is, that no action shall be brought whereby to charge a defendant *in any way* upon a verbal contract not put in writing according to the statute. (See Browne on Frauds, §§ 133, 134, and the case of Car-

rington *v.* Roots, 2 M. & W., 248, commented on in the former section.)

To give a jury "the contemplation" of parties to a void contract as a guide would be equivalent to the repeal of the statute.

Some cases have allowed the consideration of a void contract to go to the jury as an admission of value. (Burlingame *v.* Burlingame, 7 Cow., 92; King *v.* Brown, 2 Hill, 485; Browne on Frauds, § 124, and cases cited.) But the late cases exclude even this evidence.

In Erben *v.* Lorillard, 19 N. Y., (5 Smith,) 299, the judgment below was reversed because the void contract had been admitted to show the value of services rendered. The court say, "Where the agreement fixing the compensation is void, it furnishes no evidence of value. The parties are presumed to know the law, and to understand that such compensation cannot be recovered. Their position is the same, in a legal view, *as though no agreement as to the amount of compensation had been made in fact, as there has been none in law.* Were it otherwise, and had the plaintiff the right to prove the value of the land, as showing the value of the services, *according to the understanding of the parties*, such value would constitute the rule of damages, and thus the plaintiff would receive the full benefit of the bargain. At all events, if the evidence is proper, the jury may adopt that as the value of the services, and thus effect the same result. Under such a rule the statute would afford but little protection to the defendant."

It is believed, however, that in no case has the purpose or contemplation of the parties been resorted to as evidence to sustain the common counts.

It would practically amount to the enforcement of the contract, merely changing the form of declaring.

But if the contract be resorted to, does it tend in any manner to show that the parties contemplated a bailment of the patented machine for hire, instead of a sale of it?

The difference between a bailment for hire and sale is frequently very nice. The essence of the difference is that

the former vests the right to use, without the right of property, and the latter the right of property and, of course, the right to use. Looking, then, to "the contemplation" of the parties to the alleged void contract, can it be doubted that the right of property in the machine was intended to vest in the defendant? The defendant was to pay for it and for attaching it, and was further to pay for the license. The machine was never to be returned, nor was it in any manner at the risk of the plaintiffs. (2 Hilliard on Contracts, 284; American Law Register, 1864, p. 321.) The relation of the parties was plainly that of vendor and vendee, and not of letter to hire and hirer.

It is, then, evident that, whether we look to the statement of the evidence or beyond it to what the parties are alleged to have had in contemplation, the result is the same. There is no evidence to sustain the count of the declaration for the *use* of the nachine; and, the plaintiffs having failed to maintain their action, judgment of non-suit should be entered here, and an end put to this vexatious litigation.

Third Assignment of Error.

III. The court erred in respect of the measure of damages.

The action was not for infringement, but in assumpsit for the use of a patented machine. This value, as shown by every sale of the license to use made during the whole term of the patent, and the sales were numerous, ranged from $250 to $1,500, in no instance exceeding the latter sum. (R., f. 61, 62.)

The verdict of the jury was $11,333, with interest. (R., f. 115, 116.)

The evidence offered by the defendant of sales of licenses was wholly uncontradicted. The plaintiffs abstained from any evidence of value.

Fourth Assignment of Error.

IV. The court erred in striking out the pleas of limitations.

The plaintiffs had amended, making in form, and substance a new case—abandoning the special contract and counting on the assumpsit implied by law.

An amended declaration, from the time of filing, supersedes the original declaration, and becomes the only declaration in the cause.

Kanouse *v.* Martin, 3 Sandf., 600, where all the authorities are reviewed.
Tidd's Practice, 469, 474, 707.
Hockvale *v.* Kendall, 3 Barn. & Ald., 137.
Sicard *v.* Davis, 6 Pet., 124.
Barnes *v.* Lee, 2 Cranch C. C., 430.
Hyer *v.* Smith, 3 Cranch, C. C., 437.
Schnertzel *v.* Purcell, 1 Cranch, C. C., 246.
Chapman *v.* Davis, 4 Gill, 166, 176.

If the plaintiff amend his *nar.*, the defendant may plead limitations anew. (State, use of Johnson, *v.* Green, 4 G. & J., 381.)

The defence of limitations is a *legal right.* It can only be taken away or forfeited by due process of law. It does not rest in the discretion or grace or favor of any court. It is admitted that in ancient times the plea of the statute was not favored, but modern decisions hold a different language. (Bell *v.* Morrison, 1 Pet., 360.) Favored or not, all the authorities agree that it is the right of a party to plead it, and that the court cannot interfere with that right. It is only when a party is in default, and driven to ask leave to file, that the court can prevent the filing of the plea or order it to be stricken out. When the rule day has expired, or there is a joinder in issue, or from any cause leave has to be obtained, the court may refuse that leave; but otherwise it has no discretion in the matter. Angell on Lims. § 285, n. (2), and cases cited.

The defendant here was not in default. Leave to amend was obtained without notice, and the filing of the amended *nar.* not entered on the docket. Nor was it filed for near four months after the leave. The paper served did not show it was an amended *nar.* No notice to plead was served, (see rule 15,) and no rule to plead was laid by the court or in the clerk's office. The serving the copy without any notice could not put the defendant in default. It was competent for the plaintiffs to obtain the order of the judge granting leave to amend to plead within a certain time, or to have appended to the copy the notice required by rule 15; but he neglected both.

The plea did not lie to the original declaration. The averment was that payment should be made whensoever the defendant should be requested. (R., f. 9, 10.) The right of action only accrued upon demand.

Fifth Assignment of Error.

V. The court erred in admitting evidence of the relative merits of the Sickles and throttle and cut-off.

No evidence was offered of the value of the throttle cut-off.

In a suit for the hire of a horse, it would be strange to allow evidence tending to show that in speed or otherwise he was superior to some other horse.

Evidence of experts might have been admissible to show the qualities of the Sickles cut-off as compared with others in the market, and what it was reasonably worth, but no such evidence was offered. The whole body of evidence on this subject was calculated to mislead the jury.

The sixth, seventh, and eighth assignments of error require no comment.

T. J. D. Fuller,
W. D. Davidge,
Attorneys for Plaintiff in Error.

Supreme Court of the U. S.

NO. 265, OCTOBER TERM, 1873.

THE WASHINGTON, ALEXANDRIA AND GEORGETOWN STEAM PACKET CO. v. FREDERICK E. SICKLES AND TRUMAN COOK, *use of* GEORGE MATTINGLY.	In error to the Supreme Court of the District of Columbia.

The controversy between these parties has been before this court in three several cases, which will be found respectively, in 15 How., 419; 24 How., 333; 5 Wall, 580.

The case is in substance, as follows: in the year 1844, Sickles & Cook being the owners of a patent right to diminish the consumption of fuel by steam engines, by means of a machine called a cut off, to be applied to the engine, contracted with the defendants below, now plaintiffs in error, to put one of those machines on the engine, of their steamer the Columbia, and having first paid the cost thereof not to exceed two hundred and fifty dollars, out of the first saving of fuel effected by said machine, the defendants should have the right to use the said machine on the said boat during the life of the patent, if the said boat should last so long, they paying to the owners of the patent three-fourth of the amount of the saving in fuel effected by the said machine. It was further agreed that after the machine should have been put on the engine, the saving of fuel caused by the use of

said "cut off" should be ascertained at such time as Sickles & Cook should desire it, in the following manner, to wit, by taking two piles of wood, each of equal quantity and using the same, first one pile without, and then the other pile with the use of said cut off, to show whether the boat would run longest under the same circumstances with or without the said cut off. Accordingly, Sickles & Cook put the machine on the engine of the Columbia, at a cost of two hundred and twenty-five dollars, gave notice to the owners of the boat of the intended experiment, as agreed upon; made the experiment under the supervision of the officers of the boat and Cook, one of ihe owners of the patent, and the result showed a saving of 34 $\frac{175}{190}$ per cent. over the "throttle cut off" then in use by the owners of the boat. In their original agreement, the parties stipulated, that when the rate of saving should be ascertained in manner above set out, the owners of the boat should pay the owners of the machine their portion of the saving weekly or monthly or whensoever they should be requested to pay the same. In the case first mentioned above, 15 How., 419, the declaration did not contain this last clause of the agreement and this court was of opinion that there being no time fixed for the payment of the money, it was in the nature of a partnership, and no action would lie until the expiration of the patent, and reversed the court below, sending the case back for a venire de novo.

The declaration was then amended, and the owners of the machines again recovered, and the owners of the boat again excepted to the rulings of the court below, but failing to prosecute their writ of error, the case was docketed and dismissed in this court, at Term, 18 , and thus that judgment became final, and the money was made for so much of the earnings as were

covered by that case. The record of that case is in evidence in this cause.

The machine was still on the engine of the boat and her owner continued the daily use of it, and still refused to pay. This action was brought for another period of the earnings, and the owners of the patent again recovered. That case came to this court and is reported in 24 How., 333. In that case the owners of the machine relied on their recovery in the last mentioned cause as estopping the defendants from denying the contract upon which, alone, that action rested. But this court was of opinion that, inasmuch as in the action in which the recovery was had, the declaration contained the common counts in addition to the count on the special agreement; it did not create the estoppal, as had been held by the court below. And finally, in 5 Wall, 580, this court decided that evidence to show that the contract sued on was not in writing was admissible, and if such were the fact it could not be sued under the Statute of Frauds and again sent the case back *venire de novo*.

The declaration was amended by adding a count "for the use" of the machine, and the plaintiffs again recovered a verdict for $11,333, but without fixing a date when the interest shall begin to run. This is the case now at bar.

This history has been given to show, as will appear by reference to the cases already mentioned. 1st, That this court has already settled two of the questions raised on the present record.

2d. In the first case that it was admissible for the plaintiff on the first trial of this cause to introduce such evidence as is objected to by the plaintiff in error here in his 3d, 4th, 5th, and 6th exceptions.

3d. That the record of the former recovery was admissible in evidance although not conclusive, which forms the ground of the 2d exception of plaintiff in error.

To proceed with the several exceptions.

1st exception, pages 6 and 7.

On the 4th March, 1868, leave was given to amend the nar. and the amended nar. was filed on the same day. See pages 3 and 4, and a copy was served on the defendant's attorney. Page 6.

On the 1st March, 1871, page 4, the defendants filed their pleas of the statute of limitations, and on the 2d March, 1871, page 5, the plaintiffs moved the court that the pleas be not received, and this last motion was granted. The exception erroneously sets out that they were ordered to be "*stricken out.*" Subsequently, and after several terms of the court had elapsed and after the case had gone, to thecourt in general term, the attention of the judges, being called to this error, it was sent back to have it corrected *by the record*, and this is made the ground of another exception, at pages 38, and 39, record.

Answer. The object of the rule of the court below, quoted on page 6, was to bring the party into court, and at the same time to notify him of the character and nature of the demand made upon him and give him an opportunity to file his defence.

1. No notice to plead is required by the rules of the court except on filing the original declaration, rule 9, page 3. Every civil action shall be commenced by filing in the clerk's office * * * declaration as the case may be.

Rule 15, page 3. A notice to plead shall be subscribed to every declaration in the following form :

"The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof, otherwise judgment."

Except this notice to plead subscribed to the declaration no rule to plead, or demand of plea shall be necessary.

Rule 27,, page 15. If the defendant appear he shall demur or plead and serve a copy of his pleading upon the opposite party, on or before the first special term of the court, occurring twenty days after service of the process, otherwise the plaintiff may have judgment by default. *And a copy of every plea and of every subsequent pleading shall be served by the party filing it, on the opposite party or his attorney, at the time of his filing it.*"

2. The plea of the Statute of Limitations cannot be received after rule day, Lamotte v. McLaughlin, 3 H. & W. Hin., 324; State v. Green, 4th Gill and J., 218; Wall's ex'rs v. Wall, 2 Har. v. Gill, 79; Nelson v. Band, 1 Gill., 218; Schleigh v. Hagerstown Bank, 4 Gill., 306; Newcomb v. Keedy, 8 Gill., 263; Balt. & West. T. R. R. v. The States, 19 Maryland, 241. If the statute be pleaded after the plea day, without leave of the court, the plea will, on motion, be strieken out. Scott v. Lewis, 2 Cranch, C. C. R., 203.

The seventh exception begins on the 13th page, with a statement of the substance of the evidence on both sides, down to page 28, and this is followed by eleven prayers to page 30, where the exception will be found.

The court granted the 10th prayer, p. 30, and the 1st and 2d clauses of the 5th prayer, p. 29, and refused the others, and the defendants except to the *granting of the tenth prayer as prayed*, and to the refusal to give each of said prayers as prayed.

The *first* prayer is as to the weight or sufficiency of the evidence and was properly rejected.

The *second* is in substance that the machine having been put on the engine under a special contract void under the statute of frauds, and the defendants having repudiated it on that ground either party had a right to remove it, and plaintiffs allowed it to remain and defendants continued to use it, such use gave no right of action to the plaintiffs to recover for the hire of it.

This involves the question so often discussed as to the liability of a party who receives a benefit under a contract which cannot be given in evidence by reason of the statute, and continues his enjoyment of that benefit, intending to set up the statute in his defence.

A familiar illustration is that of a man entering on land and agreeing to pay rent under a contract prohibited by the statute of frauds from being given in evidence, and who still continues his occupancy. The rule is well settled that he shall pay for his use and occupation, and the rent reserved may by resorted to as one of the elements of proof as to what the compensation shall be.

But the rule is too firmly settled to be shaken at this time, that when a contract not in writing for the sale and delivery of any valuable thing, or for services, cannot be given in evidence by reason of the statute, and one party hps executed his part of the contract, and the other has enjoyed the benefit, the value of the article or services rendered may be received under an implied contract to pay what they are worth. The authorities are collected in Brown on Statute of Frauds, paragraphs 118, 124, 125 126, 131.

The *fourth* prayer asks the court, as a question of law, to state to the jury what is the *measure* of damages in this case where there is an implied contract to pay for the use of the machine under the circumstances stated in the second prayer.

There is no authority for such an instruction. The measure of damages is a fact for the jury, and the power of the court is limited to setting aside their verdict, and granting a new trial by another jury, if the damages are so excessive as to show some improper conduct in the jury.

The *fifth* prayer, p. 29, is composed of four separate and distinct clauses.

The first is, if the machine was contracted [constructed?] by the plaintiffs under the patent, and attached to the engine of the Columbia, and was used by the defendants without the license of the plaintiffs, their remedy was by an action for an infringement.

The answer to this is, there is not a scintilla of proof to support it. All the testimony on both sides agree that it was put on by the plaintiffs' themselves to be used at the request of the defendants, and yet the court gave it.

The second is, that if plaintiffs licensed it without *special contract*, the law does not imply from such license and use, a contract to pay as for hire of a patented machine.

This is in the face of this proof that it was put on at request of the defendants, under a contract which cannot be given in evidence, the term of which were clearly expressed; That it was not a gift nor intended as a gift, but that then both parties understood it was to be paid for in a special manner, (p. 13.) It was put on the steamer at their (defendants) request in the year 1844, and was continued there till May 1856, when the patent expired." There was then no evidence from which the jury could infer that it was a mere gift. Now a license may be granted without a special agreement just as well as services may be rendered, or a horse or a machine at the request of the party benefitted thereby, and the fact

that compensation was to be made therefor, may be implied from circumstances is just as clear in one case as in the other. The court properly rejected this.

The third claus was granted, and yet the defendants except. It is dificult to comprehend this.

The *fourth* clause is the same in principle as the fourth prayer, the measure of damages.

The *sixth* prayer, p. 28. Is as to the effect of a deed from Cook to Sickles, p. 26, and which does not seem to have been acted upon by the parties for on the very next page is another deed from the same parties utterly inconsistant with the ffirst. By the first dated 11, December 1846, Cook conveys to Sickles all his, Cook's interest in this patent of 20, May 1842. By the second, dated 5, August 1848, Cook & Sickles reciting that they are now equal and joint owners of the said patent, " they assign the said patent, that is the orignal, and one for an improvements to William B. Sickle's.

This is fully answered by the plaintiff's third prayer. p. 32. But the deed itsetf is wholly prospective. It could not operate upon machines already constructed and sold or leased, but not fully paid for, or upon licenses to use, the compensation thereafter to be paid for such use, and such a contract, the law implies in this case. The court properly refused this prayer.

The *seventh* prayer, p. 29, is subject to the same objection.

The *eighth* prayer, p. 30, assumes that there was an implied obligation to make " reasonable compensation for the use of the patented machine," and lays down as a rule of law the measure of such compensation. The answer is the facts set out in the prayer, are among the elements, from which the jury may ascertain that reasonable compensation, but not the measure of the compen-

ation. And so the court instructed the jury in the charge given to them. p. 33.

The *ninth* prayer, p. 30 requires the court to state to the jury, that the burthen of proof is on the plaintiff, to satisfy the jury what others paid for the right of using machines under the same patent, and there is no evidence tending to prove that plaintiffs did not sell licenses whenever opportunity offered. The answers to this are there is no proof in the record to show that the plaintiffs granted a single license to use machines under the same patent, where the machines were made and put upon the engine by the owners, except this one.

2d. This has the same vice as has already been pointed out, prescribing a rule of evidence, and instruments of proof as indispensible, when they are but among those instruments of proof which the party might or might not introduce.

3d. Such evidence would not have been admissible. The coniracts they may have made with other parties under other circumstances for like services could throw no light upon the value of the services they rendered in this case.

The *tenth* prayer, p. 30, was granted, as has been stated hereinbefore.

The eighth exception begins on the 30th page, and concludes on the 31st.

It consists of five prayers, the 2d, 4th and 5th of which were granted by the court.

The *first* of these prayers, p. 30, is the same in substance and effect as the 5th and 7th prayers already noticed. The *third* prayer, p. 31, the court is asked to instruct the jury that the plaintiff cannot recover in this action more than the highest rate which it has been

shown they received from others under special contracts.

That is to say without knowing anything of the facts and circumstances of the other cases, the jury are to be told as a question of law, they cannot give more in this case than the highest sum plaintiffs have been able to get by contract from others when they have introduced into the cause evidence to show, (see Sickle's statement, p.) that from the granting of the patent to its expiration, he was beset by litigation consuming his profits; and forcing him to sell at almost any price to enable him to carry on those contests.

The court rejected the prayer, but gave them the benefit of it by instructing the jury that this also constituted one of the elements in estimating the value of the use of that machine.

The uefendants' exception will be found on page 32, and goes to the instructions given at the prayer of the plaintiffs.

The *first* of these prayers is that if the use by the defendants was incapable of enforcement because of the Statute of Frauds the defendants were at liberty to discontinue the use and return it to the plaintiffs; but if they elected to continue the use, the law raises an implied contract that they will pay for its use on demand, a reasonable compensation so long as they continue to use it, at least up to the expiration of the patent. And the *second* is in substance and legal effect the same but expressed in different words.

The *third* in substance and effect, so far as it touches this case, is, that under the circumstances stated in the other two prayers, the defendants had a right to use that machine for a reasonable compensation, and the patent rights became incorporated with the machine and inseparable from it so long as the machine lasted, and the

sale of the patent afterwards did not affect the right of the owner of that machine to continue to use it; nor did it affect any contract which had been made between the owners of the machine to continue the use of it; nor did it affect any contract which had been made between the owners of that machine and the user of it to pay for the same."

These are but the converse of the prayers of the defendants which had already been refused by the court, and if these refusals were right there is no error is this ruling.

If the court below was right so far, the charge given to the jury, especially with the plain and liberal qualification of it made at the instance of the defendants, fairly presented the law of the case to the jury so as to leave to the defendants no ground of complaint.

JOS. H. BRADLEY,
for Defendant.